Some Reasons Why North Dakota Should Adopt the Uniform Sales Act

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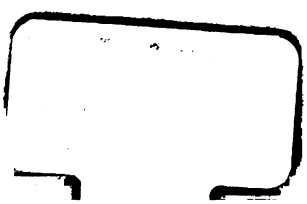

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A. PLAN OF THIS ARTICLE

THE purpose of this article is to recommend the Uniform Sales Act for adoption in North Dakota. As the Uniform Sales Act is a codification of the American common law on the subject of sales it seems appropriate, before dealing at large with the present defects in our law, to make a few preliminary remarks on the subject of codification, and to suggest why the Uniform Sales Act, as a piece of codification, accords well with our North Dakota legal system and history. After this preliminary explanation an examination is made of some of the shortcomings of our present North Dakota Law of Sales. Lastly follows the inquiry how these shortcomings may be mesurably remedied by the adoption of the Uniform Sales Act, and why the objections usually urged against its adoption are unsubstantial.

B. PRELIMINARY SURVEY OF CODIFICATION

Codification is the act or process of reducing all the law upon one or more general subjects to a code. It is a new, systematized statement of the law, enacted as one statute.[1]

I. THE ANCIENT WORLD

A thousand years of legal development in Ancient Rome beginning with the twelve tables culminated in an epoch-making period of codification.[2] The most thoro work of codification which this period produced is that which bears the name of Justinian. Justinian's codification has stood the test of time, has preserved to the modern world the laws of ancient Rome, and has thus furnished to much of the modern world a large part of the foundation upon which its present day law rests.[3] It is said to be a master-

1. From Anderson's Dictionary of Law. Also see Bouvier's Law Dictionary.
2. Hadley's Introduction to Roman Law, p. 1. For a systematic account of this development see Muirhead's Historical Introduction to the Private Law of Rome. For a shorter concise account see Sohm's Institutes of Roman Law, (Ledlie's translation) sections 9-22 incl.
3. Sohm's Institutes of Roman Law, sec. 22, sec. 28.

piece of legal achievement, whose superiority over the heterogeneous mass of law which preceded it is universally recognized.[4]

II. Continental Europe

Further codification of the law has in more recent times taken place in Continental Europe. The old German Code goes back to Frederick the Great. The Code Napoleon[5] framed a little over a hundred years ago has been widely followed in Europe outside of France, as well as where it originated, and forms the basis for the law of South America, Central America, Mexico, and Louisiana.[6] In recent years the new German Code,[7] the most thoro work of general codification that has yet appeared,[8] was adopted in the German Empire and has become the basis for legislative codification in Russia, Switzerland, and Japan.[9] It is apparent, therefore, that practically all the advanced nations of the world, the English-speaking excepted, live now under some form of codified law, the history of which goes back to Justinian's codification of the law of ancient Rome.

III. Anglo-American Experience

1. Archaic Codes. At the dawn of English political history we have some "laws" which were general enactments to sum up what had preceded, based on man's memory, custom, etc., but not on any records of either legislation or court proceedings.[10] These old laws still exercise the antiquarian and the legal historian, but have long since become obsolete as rules of law by which to settle any controversy between litigants.

2. Unsuccessful Projects. Apart from these ancient laws, based on mere oral tradition, which have now been antiquated for a thousand years, the Anglo-American system of law has never in its entirety been systematically codified. Instead of codified law we have had a heterogeneous body of law consisting of the common law, so-called, a mass of decided cases occurring in litigation, and the statute law, a mass of separate statutory enactments. There

4. See, for example, Jenks: Edward I, in Select Essays in Anglo-American Legal History, vol. 1, p. 160.
5. See Wright's French Civil Code.
6. Pound's Outlines of Lectures on Jurisprudence (1914).
7. See Wang's German Civil Code.
8. Ames' Lectures on Legal History, p. 368.
9. Pound's Outlines of Lectures on Jurisprudence (1914).
10. See Thorpe's Ancient Law and Institutions of England: Schmid, Gesetze der Angelsachsen; Lieberman, Gesetze der Angelsachen. A convenient collection illustrating the character of these laws may be found in the earlier part of Stubb's Select Charters.
Also compare these laws with the archaic law of the German tribes, for which see the "Leges Barbarorum," and with archaic Irish Law, in the Brehon Laws.

have been accessible court records since the time of the "Year Books,"[11] but no systematic general codification has yet resulted. From the time of Henry VIII to our own day various projects for codification of the whole law have been undertaken,[12] but without the indispensable culmination in statutory enactment as law of the codes proposed.

3. THE FIELD CODES. The most important attempt to codify the whole law was made in the United States a little more than fifty years ago. The result was the Field Codes, drawn up by a little group of New York lawyers of which Mr. Field was the leading member, as a codification of the American common law. As a complete system these codes failed of legislative enactment in New York, as they did in most of the other states. One of them, the Code of Civil Procedure, has been widely adopted, while in four states, of which North Dakota was one,[13] all the Field Codes were adopted in their entirety. The failure of the Field Codes to secure legislative enactment into law is attributed mainly to two causes, the crudeness of the codes themselves, and the conservatism of the bar trained under the English common law system toward any such innovation as codification of the whole law.[14]

4. PRIVATE CODIFICATION. In recent times we have had, both in England and in this country, some attempts by various individuals, frequently law professors, to state some branch of the law in definite propositions compiled in one book. Such is, for example, Wigmore's Pocket Code of Evidence.[15] These attempts at codification by individuals, on their own responsibility, of course have not the binding force of statutory enactment. They serve the purpose, however, of reducing the law to definite statements as guides to courts and practitioners, and in a mesure pave the way for more thoro codification.

5. COMMISSIONERS ON UNIFORM STATE LAWS. The most important practical steps in the direction of codification in recent years in the United States have been taken by the Commissioners on Uniform State Laws. They act for the American Bar Associa-

11. i.e., Since the time of Edward I. See Year Books edited by Horwood in the Rolls Series. See also, Reeves History of English Law, Pollock & Maitland's History of English Law.

12. Pound's Outlines of Lectures on Jurisprudence (1914). The project under Henry VIII, Bacon's Project (1614), Lord Westbury's plan (1860-1863).

13. See prefaces to Compiled Laws, 1913.

14. Williston, in Pennsylvania Law Review, vol. 63, p. 197.

15. Other examples may be given, as Wigmore's Summary of Torts, in Wigmore's Cases on Torts, vol. II. A similar tendency appears in the black letter propositions in the West Publishing Company's Hornbook series.

tion in drawing up codes for certain branches of the law, and recommending the draft codes to the legislatures of the various states for adoption. Some of the draft codes recommended by the Commissioners are the Negotiable Instruments Law, the Uniform Sales Act, the Partnership Act, the Warehouse Receipts Act, etc.[16] So far the Negotiable Instruments Act has met with widest approval, having been adopted in most of the states.[17] Some have only recently been agreed upon and recommended, while others are still in preparation.

The Uniform Sales Act, which it is the purpose of this article to recommend for adoption in North Dakota, is one of these Acts of partial codification originating with the Commissioners on Uniform State Laws. It was drawn up by a recognized authority on the law of Sales, Professor Samuel Williston of the Harvard Law School. His drafts were for several years submitted to elaborate examination and criticism, and several revisions were made. The final draft was agreed upon by the Commissioners in the year 1906 and recommended to the states for adoption.[18] The Uniform Sales Act has, up to the present time, (1915) been adopted in fourteen American jurisdictions: Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin, and Alaska.[19] It will be seen by the geographical location of most of these states, that the older and more highly developed commercial section of the country has, for the most part, already adopted the Uniform Sales Act, and that among the states which have adopted it is New York, whose court decisions are, with us, such persuasive precedents on account of our living under the Field Code which was drafted in New York.

C. WHY CODIFICATION ACCORDS WITH OUR NORTH DAKOTA LEGAL SYSTEM AND HISTORY

I. The Field Codes the Basis of Our Law and Practise.

In recommending the Uniform Sales Act for adoption in North Dakota the arguments for and against general codification need not be repeated. We are in North Dakota committed, so to speak, to

16. For a complete list of the Uniform Acts recommended, and the states where each has been adopted, see Report of American Bar Association for 1915, p. 913. The Commissioners on Uniform State Laws also publish copies of their proceedings containing this information together with much other valuable material. Copies may be obtained on application to the secretary, George B. Young, Newport, Vermont.
17. Report of American Bar Association for 1915, p. 913. Also see Brannon's Negotiable Instruments Law, or the fourth edition (1916) of Crawford's Negotiable Instruments Law.
18. See preface to Williston on Sales.
19. Report of American Bar Association for 1915, p. 913.

the principle of codification by having adopted the Field Codes under which we now live. Even tho it were granted, for the sake of argument, that uncodified law is a better system of law in application than codified law can continue to be, yet the desirability of revision of the codified law which we have must be conceded when thru such revision its improvement can be secured. Since territorial days we have lived under the Field Codes, and with these codes our legislature has in minor ways been constantly tinkering.[20] As lawyers we have become habitual code-readers on every legal question that arises, and as a people we have had more than the usual occasion for becoming imbued with the idea, however mistaken, that the answer to every disputed question of law is to be found in the statute book. Seldom indeed, in the trial court, does either lawyer or judge attempt to go much deeper into the question of law involved if they can find a specific code provision in point.[21] The work of harmonizing and piecing out the code provisions is generally left to our State Supreme Court on appeal, and even that court often dismisses its discussion of the merits of a case by a curt reference to a code section as controlling.[22] As a people, and as a legal profession, we are therefore far from being averse to codification. On the contrary, we are so thoroly imbued with it that in the face of a code provision we are rather prone to forget that law exists, not as an end in itself, but as a means to the end that justice may be administered.

II. Modifications by Legislative Enactment

As we are not averse to codification but rather emphatically committed in its favor, so we are committed to revisions of the codes we have if it seems that improvement can thereby be secured. It is axiomatic that a complete and final code is impossible.[23] As conditions change and development takes place in the world about us, to which the law is to be applied, new conclusions must be worked out from old principles, and, from time to time, these new developments must be worked into the Code by revisions.[24] Such, indeed, has been the practise so far as our legislative history is con-

20. See the frequent notations of amendments to Code sections in Compiled Laws, 1913, and the fequent recurrence of the terms, "An Act to amend" sections of the Code, in every volume of Session Laws.
21. Even the most casual attention, in observing the trial of cases in court, will sustain the accuracy of this remark.
22. A few instances of such dealing with a case are here cited at random.

7 N. D. 388, at p. 396;	75 N. W. 772
10 N. D. 120, at p. 122;	86 N. W. 226
10 N. D. 601;	88 N. W. 710
24 N. D. 152;	139 N. W. 104

23. Terry's Leading Principles of Anglo-American Law, sec. 609.
24. Ibid.

cerned. Never a legislative session passes that there is no amendment to our Codes,[25] nor are these amendments always confined to mere details. We early adopted the Negotiable Instruments Law,[26] the first and most defective piece of partial codification recommended by the Commissioners on Uniform State Laws.[27] Lately we adopted another of the Uniform Acts, the Family Desertion Act.[28] We have modified the presumption of fraud in case of retention of possession by the seller of personal property.[29] We have modified the provisions relating to warranty in the sale of goods.[30] Numerous other examples of legislative changes in our Code might be cited. Even a casual examination of our Code will reveal, thru its notation of references to legislative years, the frequency of such amendments and changes. At the last session of the legislature (1915) the amendments or repeals of Code sections numbered upward of three hundred and fifty, more than fifty of which consisted of minor changes in the Civil Code alone.[31] These legislative changes which have been made in North Dakota's history, have from time to time been worked into the Code at each periodical revision.[32] We have not as yet had, however, any attempt systematically to incorporate in the Code the development of law which has been going on at the same time thru judicial decision. Starting with a Code which is based upon the common law, derived from judicial decisions, we have made legislative changes in it and incorporated these changes in code revisions, but have in our code revisions ignored the corresponding development in the law which is derived from judicial decision.

So far as we have proceeded, therefore, in the development of our law, we are committed to the principle of codification, and we are committed to the propriety of legislative changes in our codified law whenever such changes can remedy defects and secure substantial improvement. Our Code revisions have, however, up to the present time, been partial only in their character, taking no account

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25. See note 20.
26. Session Laws, 1899, ch. 113, now appearing in the Compiled Laws, 1913, as secs. 6886 et seq.
27. See the Ames-Brewster controversy, in Brannon's Negotiable Instruments Law.
28. Session Laws, 1911, ch. 123, now appearing in the Compiled Laws, 1913, as secs. 9595 et seq.
29. Session Laws, 1893, ch. 78. The effect now appears in the Compiled Laws, 1913, as section 7221.
30. Session Laws, 1913, ch. 218, now appearing in the Compiled Laws as secs. 5991-5993.
31. This enumeration for the last legislative session is derived from the sticker pamphlet issued by the Lawyers Cooperative Publishing Company for pasting in the margin opposite the appropriate sections in the statute book the numbers of the sections amended or repealed by the last legislature.
32. For illustrations, see notes 26-30.

of the progress which is made in the law thru the process of judicial decision. It is progress in this respect, made the country over, which the Sales Act embodies, which we grope after whenever disputed questions of law arise, and which needs only the legislative fiat to make it definitely a part of our Code system.

D. SOME PRESENT DEFECTS IN OUR NORTH DAKOTA LAW

Stronger reasons, however, than merely the advantage of embodying the law we have in a definite code suggest themselves for the adoption of the Uniform Sales Act. It is the purpose in this article to point out briefly two conspicuous defects in our law, and to indicate how these defects can be in some mesure corrected by the Uniform Sales Act. These defects are: first, lack of uniformity with the law of other states; and second, lack of certainty as to what our own local law is.

I. Lack of Uniformity with the Law of Other States

The first of these defects, lack of uniformity with the law of other states, is constantly leading to confusion, especially in commercial matters, as transactions on an increasingly large scale involve action in different states governed by divergent laws on the same subject matter. Thus, with a promissory note made in North Dakota, payable to a person living in Minnesota, and by him indorsed in Iowa or Chicago, etc., if the laws of each of the respective states are different in regard to these simple transactions relative to a single negotiable instrument, the greatest uncertainty and confusion as to rights of the different parties must result. To remedy this situation in regard to negotiable instruments, the Negotiable Instruments Law, the first and crudest of the Acts proposed by the Commissioners on Uniform State Laws, has been adopted in nearly all the states of the Union.[33] The lack of uniformity between the laws of different states in regard to other commercial transactions, notably in regard to sales, bills of lading, etc., is equally conspicuous, tho less progress has been made in curing the defect.[34] It is a matter of every-day occurrence that goods are bought in one state by parties living in another, and that goods are shipped from state to state. Without uniformity as to when delivery of possession is essential to a valid sale, as to what is good consideration to make a contract

33. Report of the American Bar Association, 1915, pp. 913, 914.
34. The report of the American Bar Association, 1915, at p. 914 shows that the Uniform Sales Act has so far been adopted in fourteen jurisdictions, as against forty-seven jurisdictions which have adopted the Negotiable Instruments Law.

binding for the sale of goods, as to what is necessary to be done to pass title, etc., such every-day transactions can be carried on only with the risk of financial loss and disappointment in litigation whenever anything occurs to upset the calculations of the parties or to cause disagreement between them over their bargain.

It is needless in this article to examine at length the evils caused by lack of uniformity between the different states in regard to their commercial law. Every recent report of the American Bar Association contains statements and arguments from the Commissioners on Uniform State Laws covering elaborately this phase of the question.[35] It is primarily to remedy this situation thruout the country as a whole that the Uniform Acts, including the Uniform Sales Act, have been proposed for adoption. The difficulties arising from lack of uniformity are present with us, as they are in other states. The Uniform Acts can succeed in overcoming them only so far as they are generally adopted by the different states. By adopting the Uniform Sales Act we therefore not only improve our own law in this respect, but contribute that much toward improving the law of every other state thruout the country.

II. Lack of Certainty

The second defect in our law with which this article is concerned, the lack of certainty as to what our own local law is, touches us even more closely than the lack of uniformity with the law of other states. It is a defect in which the law of North Dakota is very conspicuous. Every lawyer in active practise knows how difficult it often is to advise a client who comes to consult him. The lawyer's difficulty may be due of course to uncertainty as to what actually happened which caused the trouble. It is frequently due, however, to the impossibility of finding out what the rule of law is.

1. Lack of Certainty as to the Facts Involved. Lack of certainty as to the facts in dispute between parties is of course a problem inseparable from litigation. Where two parties get into a controversy if often happens that they disagree as to what actually took place between them, that they disagree as to what words were spoken in their dealings with each other, that they disagree as to the quality of the goods supplied, etc. Where the parties disagree as to the facts, where there is no agreement as to what really happened, no lawyer can presume to be omniscient enough to foretell with exactness what the jury, on consideration of all the evidence,

35. See, for example, the Report for 1915, pp. 919-948, and the Report for 1914, pp. 1044-1089.

may find the facts to have been. No legislation, and no amount of litigation, can preclude occasional disagreement between parties as to what actually happens in their current transactions. Such disagreement will lead to litigation so long as neither will yield the whole point and parties are law-abiding enough to resort, not to brute force, but to the orderly process of law for the settlement of their controversies. Lack of certainty as to the facts is therefore inevitable in ordinary litigation.

2. Lack of Certainty as to What the Law is. Lack of certainty as to what the legal rule is, as distinguished from lack of certainty as to what are the facts involved, is a defect which can be mesurably remedied, but which, while it remains, produces quite as much expensive and unsatisfactory litigation as is produced by lack of certainty as to the facts. How often does not our Supreme Court preface its opinion, in deciding a case, with the remark that there is practically no dispute as to the facts involved?[36]

a. *Causes.* The lack of certainty as to what our own local law is, is due mainly to two causes. First, the Code under which we live was a crude first attempt at general codification made by men who were too few and too busy with the duties of an active law practise to study with sufficient care and arrange and correlate effectively all the law they were called upon to codify. The Code, furthermore, was drawn up more than fifty years ago when the conditions under which business was done were very different from what they are now, and when many of the questions which now occur and recur had never arisen. Our Code, therefore, is not only a crude piece of codification,[37] but is also entirely silent on many vital questions of commercial importance.[38]

The second cause for the lack of certainty in our local law is the meagerness of our own authoritatively binding decisions, in comparison with the immense array of conflicting precedents from other states, all of which are more or less persuasive but none of which are binding upon us as authorities. Our North Dakota Reports number only thirty volumes. The number of volumes of reports of decisions from other states, which are for us persuasive but not binding authorities, runs into thousands. Our line of local decisions

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36. The following are a few cases cited at random as illustrations:
22 N. D. 435; 133 N. W. 988
30 N. D. 43; 151 N. W. 988
30 N. D. 112; 151 N. W. 879
30 N. D. 292; 152 N. W. 803
153 N. W. 137
37. Williston, in Pennsylvania Law Review, vol. 63, p. 197.
38. See below. (c). Examples of uncertainty in our law.

goes back only about thirty-five years. The decisions in many other states go back a hundred years or more, and for the period before that, the English cases go back hundreds of years further still.[39] Our local decisions have decided relatively few questions in comparison with the number of questions that have arisen and been passed upon, taking the courts the country over. These decisions from other states, however, are often conflicting, while all are more or less persuasive as precedents. Without local decisions in point we are therefore in a conspicuously worse position, so far as certainty of the law is concerned, than many of the older states, each with its own long line of authoritative decisions settling its own local law.

b. *Illustration.* The difficulties produced in practise by the lack of certainty as to what the law is may be conveniently illustrated by a concrete example. A farmer orders a machine from a machine company, to be delivered a certain time later. Before the time for delivery something happens to cause him to change his mind. He notifies the company that he does not want the machine. The company, insisting upon its contract, ships the machine and claims the contract price. What are the rights of the parties?[40] If the company sues the farmer for breach of his contract it will recover damages for the breach, i.e., it will recover the difference between the contract price and what the company could obtain on a re-sale of the machine.[41] This may be nothing at all, and is ordinarily likely not to be a great deal, for example, $100. If the company is allowed to recover the full contract price it will foist the ownership of the machine upon the farmer without his consent, and will get, if the machine is an expensive one, several thousand dollars. At this stage the farmer consults a lawyer to find out whether he must take and pay for the machine or whether he need only pay such damage as results to the company from his refusal to take it. The lawyer looks up the Code and finds nothing decisive on the question of whether title can be cast upon a person without his consent to receive it. He next looks diligently thru his set of North Dakota Reports. The exact question has never with us been decided. He looks next at the authorities from other states for guidance. In a number of states, as in our own, the question has not been decided. It has been decided in a considerable number of states, but different

39. For a more elaborate description of this situation, with reference to the country at large, see Williston in Pennsylvania Law Review, vol. 63, p. 203.
40. This illustration is taken from 153 N. W. 187, a recent North Dakota case.
41. Mechem on Sales, sec. 1690.

states have decided it in different ways.[42] Some have decided that if a person contracts to receive title, the title may thereafter be forced upon him without any further consent to receive it. Others have decided that a contract to buy goods, like any other contract, may be broken by either party, the party breaking it becoming liable to pay damages for the breach. Having exhausted the available material for finding out what the law is, what is the lawyer to tell his client? If he is thoroly candid he can only tell him that our law is yet undecided on his question, but that if the client cares to bear the expense of litigating the case till it can reach our Supreme Court his question may be decided. Still, which way it will be decided he can only guess.

c. *Examples of Uncertainty in our Law of Sales.* That the above illustration as to uncertainty in the law is not unique but typical, as applied to our law of Sales, may be demonstrated even by a casual examination of disputed questions in this branch of our law. Our law is uncertain as to whether property which is to come into existence in the future, as future crops, etc., can be sold before it comes into existence, however absurd such a question may superficially appear.[43] Our law is uncertain as to what rules are to be

42. Mechem on Sales, sec. 1694.
See also elaborate collection of authorities on each side of this question in Williston on Sales, secs. 563-66.
See also note to Williston's Cases on Sales, (2nd. ed.) p. 512.

43. The law of North Dakota as to what personal property may be sold, as distinguished from what may be contracted to be sold in the future, is, despite our Civil Code and the decisions of our Supreme Court from the beginning down to the present time, in as great confusion as in the usual common-law states. With us, as with them, there is no doubt that a person may, in general, sell that which he owns, that he cannot sell that which has ceased to exist, and that tho he can make a valid contract to sell that which belongs to another, he cannot presently sell it because he has as yet no title he can transfer. So far all authorities are in substantial accord, and the law of North Dakota is no exception. But when the question is raised whether a person may sell now, so as to transfer title, that which is not yet in existence, there is great confusion in the common-law authorities.

The North Dakota cases have arisen in regard to future crops, reaching a rule of thumb for the particular facts raised under croppers' contracts, followed in the later cases as a matter of authority, but without consistent reasoning in the different cases. The consequence is that no one can tell, outside the narrow facts in the cases decided, whether under our law future goods are to be regarded as presently transferable.

For authorities see the line of cases following in the wake of Angell v. Egger, 6 N. D. 391; 71 N. W. 547, holding that the crop belongs to the owner of the land, not to the renter, under the stereotyped form of croppers' contract. In the principal case the question is left open whether it is a case of an owner of land, with another working on the land as his servant, and therefore the crop belonging to the owner, or whether it is a case of landlord and tenant, but the crops which would belong to the tenant sold to the landlord by the original agreement before they come into existence. Since the principal case was decided the court has several times come to a similar conclusion, but without further defining its position. In the last case examined, 30 N. D. 275; 152 N. W. 684, the court leans toward the former view, that there is no lease at all, and therefore no question of sale involved. For other cases on this topic see,

9 N. D. 627; 84 N. W. 561
10 N. D. 37; 84 N. W. 563
16 N. D. 595; 114 N. W. 377
18 N. D. 93; 118 N. W. 242
20 N. D. 211; 126 N. W. 1011
27 N. D. 235; 145 N. W. 821
9 N. D. 224; 83 N. W. 238
16 N. D. 323; 113 N. W. 609
17 N. D. 173; 115 N. W. 667
19 N. D. 787; 125 N. W. 304
21 N. D. 255
29 N. D. 180; 150 N. W: 881

applied for ascertaining whether parties intended to transfer title,[44] a question which is immensely important when unexpected things happen, since the parties themselves often do not consider the question of just when title is to pass. Our law is meager as to what is sufficient appropriation of the goods to pass title under a previous contract to sell.[45] Our law is uncertain as to the effect a C. O. D. provision has upon the time of the passing of title to the goods shipped.[47] Our law is uncertain as to whether the existence or cancellation of an already existing debt is good consideration for a transfer of title to goods[48] or bills of lading.[49] Our law is, or at

44. The Compiled Laws, sec. 5535, leaves the question at large, merely saying on this point, that the title passes whenever the parties agree upon a present transfer. We have no series of cases working out the question what the result must be when, as usually happens, parties do not think particularly about the question of just when the title is to pass. In such cases there will be great difficulty if, before they have entirely completed their transaction the goods are lost or destroyed, or greatly depreciate, etc., and the question immediately becomes acute, "whose loss?", which must depend on who was the owner at the time the loss occurred.

45. It is submitted that we have in North Dakota no peculiar rules as to what amounts to sufficient appropriation to pass title under a previous contract to sell. There are, however, few cases dealing with the subject in our local reports, and none, apparently, which consider the questions in regard to appropriation on which the common-law authorities are divided. We accept, for example, the rule that there is appropriation by delivery to the carrier, (Compiled Laws secs. 5968-9, and 15 N. D. 557; 108 N. W. 545), while we have no local authority on the question of how title is to be determined in case of piecemeal delivery, a question on which the common-law authorities do not all observe the same distinctions. On the general question, see Williston on Sales, sec. 277, and authorities cited.

47. That the American Common-law authorities on this question are much in conflict, see Williston on Sales, sec. 345, Mechem on Sales, sections 740, 793, 794, and notes, especially note to Mechem sec. 740, containing a considerable compilation of authorities. For some further interesting cases on the question, see 89 S. W. 1132 (Ky.) and 130 N. W. 368 (Ia.).

The question has been most elaborately litigated in cases of liquor shipments into dry territory. By the ordinary rule of law that title passes on delivery to the carrier, if the shipment is in accordance with the order, the title to the liquor passes when it is shipped by the seller in wet territory. What happens thereafter is then not a violation of the prohibition laws unless the liquor is resold, a fact often hard to prove. Such has been the holding in the majority of states where the question has been litigated, the courts thinking that there was no basis for inferring any other than the ordinary intent as to the passing of title from the mere fact that the goods were marked C. O. D. Such restriction as to delivery has been held to indicate merely an intent on the part of the seller to insist upon his seller's lien.

The importance of the question, from the standpoint of enforcement or evasion of the prohibition laws has been considerably diminished by the Federal Statute. (U. S. Compiled Statutes [1913] sec. 10409) which prohibits railway companies, express companies, etc., from collecting on or after delivery in case of liquor shipments over state lines, and makes violations of that prohibition subject to heavy fine. The Federal Statute, however, does not directly touch the question of title to the liquors in the course of such shipmens.

48. For a concise and able discussion of this question under the common law authorities thruout the country, see Williston on Sales, sec. 620 and notes, citing authorities.

It is held by the weight of authority in this country that the existence or cancellation of a pre-existing debt is not good consideration for a transfer of title to goods, and that a purchaser under such circumstances not being a purchaser for value, is not protected, even tho acting in good faith, against defects in his seller's title. It is submitted that this position taken by the weight of authoriy is erroneous and ought not to be followed, for the cancellation, at least, of the pre-existing debt, by extinguishing it, subjects the purchaser of the goods to a detriment he was not bound to bear. Furthermore, any revival of the old debt by operation of law if the purchaser loses the goods he received in exchange for it is no adequate relief, since the original debtor may be and frequently is now insolvent.

least was until very recently, uncertain as to whether, if a contract to sell has been made, the title can be forced upon a party without his consent instead of leaving him merely to pay damages for his breach of contract. It is doubtful whether we even yet have that broad question finally determined.[50] Our law is uncertain as to which party is to prevail where there is a bona fide transferee for value of an order bill of lading after an unpaid seller's notice to the railway company to stop the goods.[51] Even in our law of warranty in sales, as to which the Code goes into considerable detail, there is much uncertainty, as, for example, on the question of whether a breach of warranty in a sale is a ground for rescission.[52]

These examples of course cannot purport to be a complete enumeration of the matters in regard to which our law of sales is uncertain. They are enough, however, to indicate that in regard to many ordinary commercial transactions it is impossible to tell with any certainty, in advance of litigation on the particular point, what the rule of law actually is.

The condition of our present law of sales is therefore curtly exprest in the one word "uncertainty." The Code is silent on a great many important questions. Relatively few of these have yet been decided by our Supreme Court. On many of them the authorities from other states are in more or less conflict. Every such question with us therefore presents a problem on which no lawyer can satisfactorily advise his client in advance. To get it settled involves the painful, dilatory, expensive, and uncertain process of litigating every point and appealing it to our Supreme Court for final decision. This process touches but a single point at a time,

49. See Williston on Sales, par. 620, and authorities cited. In the case of the transfer of bills of lading or warehouse receipts to order there is a greater tendency among the authorities to hold a pre-existing debt to be good consideration than in the case of transfer of goods. See 110 Cal. 348;; 92 Pac. 918; 53 Md. 612; 132 Mo. 492; 33 S. W. 521. The reason for the difference seems to be that since bills of lading are regarded as more in the nature of commercial paper, semi-negotiable, so to speak, courts are more willing to follow the analogy of negotiable instruments in this particular. That an antecedent debt is held to be value in the case of negotiable instruments, see sec. 25 of the Negotiable Instruments Law, found in Compiled Laws of North Dakota (1913) sec. 6910. See also, Brannon's Negotiable Instruments Law, pp. 32-35, and authorities cited.

50. See 153 N. W. 137, the latest North Dakota case which has dealt with the question.

51. On this question California has held that the transferee is to prevail. See 51 Cal. 345. This view, tho correct on principle, is opposed by the weight of authority. See Williston on Sales, sec. 542; Mechem on Sales, sec. 1567; Burdick on Sales, p 236, and authorities cited. The best discussion on principle is found in Williston sustaining the California case and taking issue with Burdick and Mechem who approve the weight of authority.

52. Compiled Laws (1913), sec. 5994, "The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended to operate as a condition." How the proviso is to be applied in practise does not appear, nor is any positive light shed on that question by the reported cases. See 14 N. D. 419; 21 N. D. 575.

leaving the old uncertainty still prevailing as to which way our court will hold on all the other questions. This is our condition, too, while many of these questions have been variously dealt with by other courts, whose decisions, tho not always very helpful as precedents because too conflicting, have supplied the material embodied in definite rules found in the Uniform Sales Act.

d. *Certainty the Prime Requisite.* Lest it be thought that a fetish is here made of legal certainty, a few words must be said on the question whether certainty is preferable to growth and development in the law.

Activity and change is the law of life. Everything which is in process of development must contain some elements of uncertainty. Technical rules of law form no exception to this general law of life. When the law ceases to grow the law is dead.[53] Every legal rule must in course of time be subjected to a process of growth and development which may change the force of its application. Every legal rule, like every moral precept, must be subjected to a process of progressive interpretation.[54]

On the other side, without some regularity in application there can be no rule of law at all. As has been aptly said, "Law is the quality of being uniform and regular in a series of events, whether in human or in external nature."[55] Constant change in the law produces so much uncertainty that the rule of law itself is apt to be lost. Law which is in the process of growth must necessarily be somewhat uncertain. Then, is our alternative the unpleasant one of growth with uncertainty or certainty with stagnation?

The solution of the problem thus presented is found in two directions. In the first place, we must determine the relative importance of growth or of certainty in any particular field to which the law is to be applied. There are parts of the law where it is important that growth should be easy, where the importance of a set rule is of minor consequence. Thus, what is reasonable force to use in expelling a trespasser may vary with circumstances and may change with the times. The determination in the particular case is of minor consequence as far as it affects the rights of other parties. So, speaking generally, tho it is impossible to make sharp distinctions here, the rules of law governing ordinary human conduct

53. Holmes' The Common Law, p. 36.
54. The most conspicuous illustration of this process as applied to definite legal rules is to be found in the Roman legal development under the Twelve Tables, which in theory remained unchanged for a thousand years. See Sohm, Institutes of Roman Law, Ledlie's Translation, sec. 12. See also Muirhead's History of Roman Law.
55. Wigmore, Summary of the Principles of Torts, sec. 2, in Wigmore's Cases on Torts, vol. II, Appendix A.

should be capable of ready development to fit the cases to which they have to be applied. On the other hand, there are some situations in which the importance of having a definite rule understood by the parties is far greater than the importance of change and growth in the particular rule adopted.[56] The conventional example of the law of the road affords a ready illustration. It is highly important, especially in this age of automobiles, that parties should know to which side to turn to avoid collision, but it is of little or no intrinsic importance whether the rule requires them to turn to the right or to the left. So, in the law of property, it is considered more important to preserve the rules as they are, which people may find out in order to adjust their dealings accordingly, than to make frequent changes to remedy particular cases of hardship, because the ultimate result of frequent changes in property law will be to shake titles and undermine the security of acquisitions, which will destroy the incentive to accumulation of property.[57]

In which class of cases do commercial transactions fall? Do they call for ready growth and change in the rules of law, with consequent uncertainty, or do they call for certainty as the most important consideration? The answer must be in favor of certainty. Unless, for example, there were some assurance that the obligation to pay debts would continue to be recognized by the law, money would be lent only at extortionate rates, and development of the country's resources on the basis of conservative credit would be impossible. Unless there is certainty in the laws affecting commercial transactions, such as buying and selling, and the giving of credit, such transactions can be entered into only at the risk of disappointment and litigation. If the rules of law are certain, parties may find out in advance what they are and regulate their conduct accordingly. If the rules of law are settled, business can be done more effectively because done with greater security.[58] Even if no inquiry be made in advance, if the rules of law are settled, a controversy can usually be settled without litigation, or, at most, by a trial of the facts in the lower courts. Without reasonable certainty as to the rules of law governing their transactions parties can not go far in the ordinary present day commercial transactions at all.

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56. The suggestion that rules of law applicable to conduct should be flexible for the sake of securing justice in administration, while rules of property should be rigid, for the sake of security of acquisitions, is derived from lectures by Professor Pound, now Dean of the Harvard Law School, in a course on Jurisprudence.

57. See, for example, John Stuart Mill, Principles of Political Economy, Book V, Cr. VIII, sec. 1.

58. See Mill, Principles of Political Economy, Book V, Chapter VIII, sec. 3.

The greater the certainty as to the rules of law the greater is the security with which business can be done,[59] and the greater is the opportunity for settling controversies without resorting to litigation.

The second answer to the alternative of growth with uncertainty or certainty with stagnation is found in the fact that even conventional rules, laws of property, and codified law, are themselves subject to a slow process of progressive interpretation,[60] and can even be changed by legislative fiat, like any other laws, if such change seems necessary. The alternative is not one between growth and stagnation, but merely a question of where the emphasis is to be placed, on ready change, or on such certainty as will enable business to be carried on with reasonable security.

The conclusion therefore is that as to commercial transactions, such as sales, the prevailing uncertainty of our law is not a boon indicative of healthy growth, but an evil hampering the conduct of business which has been tolerated because apparently inevitable. If this uncertainty is not inevitable but in a mesure avoidable, thru the adoption of the Uniform Sales Act, we should all be willing, by adopting the Sales Act, to reduce uncertainty to certainty.

The inquiry follows how the adoption of the Uniform Sales Act would contribute to cure the evils of uncertainty and of lack of uniformity which have been here set forth.

[To be continued]

59. Adam Smith's Wealth of Nations, Book III, Chapter II.
60. See note 54 on the progressive interpretation under the Twelve Tables.

Some Reasons Why North Dakota Should Adopt the Uniform Sales Act

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OUTLINE*

* Page numbers in this Outline, up to page 67, refer to the first installment of the study found in the Quarterly Journal of October, 1916.

(*Continued from the Quarterly Journal of October, 1916*)

E. HOW THE PROVISIONS OF THE UNIFORM SALES ACT WOULD IMPROVE OUR NORTH DAKOTA LAW

I. A Step toward Uniformity with the Laws of Other States

1. Agreement with the Greatest Weight of Authority. It has already been briefly indicated[61] how our law in North Dakota is defective from lack of uniformity with the laws of other states. The remedy proposed is to adopt the Uniform Sales Act. The Act has already been adopted in a considerable number of states.[62] Complete uniformity with the laws of all other states by this simple means is as yet unattainable, the Act not yet having been everywhere adopted. It has been adopted already, however, in a sufficient number of states to constitute the largest mass of authorities in agreement on the questions dealt with to be found in the country. The states which have adopted it all now have the same rule of law on the questions involved. On those questions many other states have each some local law. On the whole, that law often agrees with the rules in the Uniform Sales Act,[63] but it is not always the same on all points.[64] Moreover, the laws of the states which have not adopted the Uniform Sales Act, where they differ from the rules

61. See the previous article, Quarterly Journal of the University of North Dakota, Oct. 1916, at pages 60-61.
62. See page 57, previous article.
63. The Uniform Sales Act being a careful codification of the common law generally prevailing, the rules of law therein exprest accord with much actual case law in the various states thruout the country.
64. So, especially, in regard to the questions on which there is much division of authority, the local law may not always be the same as that exprest in the Act.

in that Act, may differ diversely in the different states.[65] If the law of a particular state is not in accord with the Uniform Sales Act, it does not follow therefore that its position is supported by the laws of the other states which have not adopted the Act. Many of them may agree with the rule in the Uniform Sales Act on that particular point, while those that disagree scatter in several directions. Adoption of the Uniform Sales Act in North Dakota would therefore place our law, in so far, in accord with the largest unified body of law on the subject prevailing at the present time in the country.

2. INCREASE OF UNIFORMITY EVERYWHERE. It should not be forgotten, moreover, that the adoption of the Uniform Sales Act in North Dakota is in this respect more than a local matter. Inconveniences to us arise from differences between our law and the laws of other states.[66] Partly as a step toward removing those inconveniences, let it be assumed that we adopt the Act. By adopting the Act we not only remove our own inconveniences in that respect, but also remove, in so far, the inconveniences of those with whom we deal in other states. All have suffered from the inconveniences arising from the same cause, lack of uniformity. If that cause is removed, it relieves everyone concerned, and enables business with others to be carried on more satisfactorily all around. By removing the lack of uniformity here, therefore, we not only improve our own law in this respect, but contribute a part toward improving the law of every other state, and reap the reward of more satisfactory dealing with those with whom we do business thruout the country.

3. UNIFORMITY IN DEALING WITH PRECEDENTS. A further consideration in regard to the effect of the adoption of the Uniform

65. A ready example is afforded by the different views adopted in different jurisdictions as to whether title passes when the price of the goods yet remains to be determined by some further act such as weighing or mesuring. In some states it is held that there is a presumption in such cases that title was not intended to pass even when the weighing or mesuring was to be done by the buyer. See 128 Ala. 221, 29 So. 640; 82 Me. 570, 20 Atl. 237. In other states it is held that there is such a presumption only if what remains to be done is to be done by the seller. See 102 Ky. 165, 43 S. W. 222; 72 Minn. 159, 162, 75 N. W. 1. In many states it has been held that there is such a presumption if the price still remains to be ascertained, the court not adverting particularly to the question of who is to do the weighing or mesuring. See 25 Ark. 545; 90 Ind. 268; 21 Ia. 508; 57 N. H. 140; 22 Ore. 277, 30 Pac. 495; 36 S. C. 69, 15 S. E. 344; 45 Vt. 124; 14 Wash. 315, 44 Pac. 544; 41 W. Va. 481, 23 S. E. 800; In still other states it is held that there is no presumption at all as to whether or not title is intended to pass, from the mere fact that weighing or mesuring to determine the price still remains to be done. See 107 Cal. 348, 40 Pac. 534; 69 Tex. 128, 6 S. W. 402. This position was also taken in New York before the Uniform Sales Act was adopted there (116 N. Y. 371, 22 N. E. 404; 174 N. Y. 534, 66 N. E. 1104), and is the position adopted in the Uniform Sales Act, section 19, now in force in a considerable number of states. As to the authorities on this question at common law, see, further, Williston on Sales, sec. 269, and Mechem on Sales, secs. 515-532.

66. See above, pp. 60-61.

Sales Act toward bringing about uniformity with the laws of other states may be mentioned. The decisions of the courts of a number of states on questions arising in regard to sales are already being rendered under the Uniform Sales Act. Without the Uniform Sales Act yet adopted here, can anyone tell what weight to attach to those decisions as authorities when they are cited to our courts as against conflicting decisions on similar facts from states where the Act is not in force? If the Uniform Sales Act were adopted in North Dakota, this question could present no difficulty, since the Act itself contains an express provision[67] to take care of the question of what weight is to be given to decisions under the Sales Act in other states.[68]

II. A GREATER MESURE OF CERTAINTY

Much more important, as a local matter, than securing uniformity with the laws of other states is the question of securing certainty in our local law.[69] The ordinary litigation in our courts is usually between local people in regard to local transactions. For every instance of difficulty on account of lack of uniformity with the laws of other states in regard to sales, there are many instances of difficulty because the local law of sales is too uncertain. It is not here contended that absolute certainty can be attained. All legal history belies any such possibility. As controversies arise and new situations are presented, courts will be needed to apply the law. It is submitted, however, that the adoption of the Uniform Sales Act would definitely settle many unsettled questions in our local law, to that extent render it more certain, and thereby reduce the need for so frequent and long continued litigation.

A comparison of the present position of our law with the provisions in the Uniform Sales Act will demonstrate that in many respects the prevailing uncertainty may be reduced to greater certainty. The discussion to follow assumes that it is desirable to have rules of law definite and settled,[70] and is confined to showing the more important particulars in regard to which the Uniform Sales Act is more definite and certain than our present Code. Within the limits of this examination no attempt can be made to discuss at length the merit of the particular rules of law contained in the Uniform Sales Act where our Code has no rules at all, beyond noting the fact that they are neither new nor startling, being based on

67. See Uniform Sales Act, sec. 74.
68. As to how sec. 74 has fared in the courts, see below, notes 103 and 120.
69. See above, pp. 61-69.
70. See above, pp. 67-69.

common-law development in actual litigation. For extended discussion on the merits of each particular rule embodied in the Uniform Sales Act the interested reader must be referred to the treatises on the law of sales.[71]

The Uniform Sales Act contains seventy-nine sections. Of these, more than fifty[72] deal with matters in regard to which our present Code is entirely silent. Some thirty[73] deal in detail with matters on which the provisions in our Code take a more general and indefinite form without being inconsistent with the provisions of the Uniform Sales Act. Only a few[74] of the seventy-nine sections of the Act work substantial changes in the law already exprest in our Code. The correctness of these statements may be best demonstrated by a little prosaic attention to each of the sections in turn.

1. Specific Provisions on Matters in Regard to Which Our Present Code is Silent. a. *Acceptance under Statute of Frauds.* Section 4, (2) and (3),[75] codify the results of much litigation under the Statute of Frauds, as to what is "goods" and what is a sufficient "acceptance" to satisfy the statute. The Statute of Frauds, as passed in England in 1677, required, among other things, that for a sale of goods to be enforceable there must have been acceptance, etc., or a memorandum in writing, if the price was over $50. Our Code substantially re-enacts the old statute in these respects, without affording much assistance as to this question under it which has led to so much litigation, tho one of our local cases[76] has reached a result substantially in accord with the rule in the Uniform Sales Act.

b. *Partial Loss or Deterioration.* Section 7 (2) provides a definite rule as to how the rights of the parties are to be adjusted in case they have purported to sell specific goods, but the goods without the seller's knowledge have partly perished or greatly deteriorated. This situation has led to considerable difficulty at common

71. See, for example, Mechem on Sales (2 vols.), Burdick on Sales, Tiffany on Sales, and Williston on Sales. The last mentioned, Williston on Sales, is the best adapted work for use in connection with the Uniform Sales Act, since the material is collected and arranged appropriately under each section of the Act.

72. See pages 126-133 of this article.

73. See pages 133-135 of this article.

74. See pages 145-151 of this article.

75. As references may be freely made to our Code in any copies of the Compiled Laws of North Dakota (1913), no attempt will here be made to reproduce at length all its language. Similarly, as references may be made to copies of the Uniform Sales Act, it is unnecessary to waste space by repeating its provisions here, except so far as is necessary for clearness of expression. The references to our Code, in this paper, are to the edition of 1913. The references to the Uniform Sales Act are to that Act as recommended by the Commissioners and as appearing in Williston's treatise.

76. 3 N. D. 76, 54 N. W. 228.

law,[77] and is not provided for in our present Code. Section 8 deals with similar questions involving similar difficulties where there is a contract to sell specific goods, a situation equally unprovided for in our Code.[78]

c. *Effect of Conditions.* Section 11 deals with the effect of conditions in a contract to sell or a sale, and distinguishes them from warranties, which, in the proper usage of this terminology, are promises.[79] This inquiry is untouched in our Code.

d. *Warranty.* Section 14 (4) contains a well established rule at common law, that in a sale of a known described and definite article there is no warranty of fitness for any particular purpose.[80] On this matter our Code is silent. Section 15 (5) specifies that a warranty of quality may be annexed by the usage of trade. It would seem as if this result would be universally accepted on common-law principles of contract, the usage showing what the intention of the parties, if called to the matter, must have been. Unfortunately, the actual litigation on the question has led to much disagreement.[81] On this question, too, our Code is silent. Section 15 (6) settles the question that an express warranty does not exclude an implied warranty unless inconsistent. This is in accord with the better view at common law, there being nothing in the mere fact that a promise in regard to one matter is exacted to indicate that other promises which would be understood in the ordinary course are thereby excluded. On this question, however, there is much conflict of authority in the cases[82] and on it, again, our Code is silent. Section 16 (c) establishes the wholesome rule that the warranty in a case of a sale by sample implies not merely that the goods are like the sample, but that where the seller is a dealer in that kind of goods they are free from defects rendering them unmerchantable which would not be apparent on a reasonable examination of the sample. Common-law authorities support this view[83] but on it there is nothing in our Code.

e. *Rules for Ascertaining Intention.* Section 19 contains a number of definite rules for ascertaining the intention of the parties,

77. Williston on Sales, sec. 162, Mechem on Sales, sec. 199.
78. See 129 U. S. 101, 9 S. Ct. 255, 32 L. ed. 636; 94 Mich. 127, 53 N. W. 929; 53 Minn. 199, 54 N. W. 1110.
79. This feature is elaborately explained in Williston on Sales, secs. 180-181.
80. 157 U. S. 94, 15 S. Ct. 503, 39 L. ed. 632; 175 Ill. 631, 51 N. E. 587; 76 Kans. 206, 91 Pac. 179; 32 Minn. 371, 30 N. W. 359; 189 Mass. 344, 75 N. E. 624.
81. See for example, 10 Wall. 383, 19 L. ed. 987; 5 N. Y. 95, 55 Am. Dec. 321; 20 Pa. St. 448; 87 Ill. 547; 20 N. H. 384; 4 Taunt. 847.
82. Williston on Sales, sec. 239 and Mechem on Sales, secs. 1259-1260 cite numerous authorities on each side of this proposition.
83. L. R. 4 Ex. 49; L. R. 7 C. P. 438; 12 A. C. 284; 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799.

where there is nothing in the transaction showing it affirmatively, as to whether title is to pass. This is a matter upon which there is an immense amount of conflicting litigation.[84] It is a matter, too, which is of supreme importance, since, very often, the parties do not think particularly about just exactly at what moment they want title to be transferred, but that fact later turns out to be decisive as to their rights when the goods have been lost or deteriorated before the parties have entirely completed their transaction. In such cases, of course, the loss, unless otherwise stipulated, or shifted by the fault of either, must fall upon the one who was owner when the loss occurred. As they did not arrange particularly about the matter before, after the loss occurs each is likely to insist that the other was the owner who now must bear the loss. The general rule is recognized that title passed in a sale if the parties intended that it should, but without affirmative evidence on what that intent was, when the question has to be decided between two parties, presumptions must be resorted to. What those presumptions are to be, in different corcumstances commonly arising, it is needful to have definitely specified in order to be able to settle such common cases without too much long-continued and expensive litigation. The Uniform Sales Act here specifies them, while on what they are to be there is in the cases much conflict of authority and in our Code there is nothing at all.

f. *Mercantile Theory of Documents of Title.* Section 20 (2), (3), and (4), and sections 27-40; This series of provisions establishes the law of documents of title—i.e., bills of lading and warehouse receipts, in accordance with what is called the "mercantile" theory, as opposed to the "common-law" theory of such documents. Both theories have much support in decided cases, tho the mercantile theory is probably becoming more firmly established while the common-law theory is waning.[85] By the so called common-law theory of documents of title the form of the document is prima facie evidence of who has title to the goods for which the document was issued. Other circumstances may, however, by this theory, be brought in to contradict the document and show that title to the goods was really elsewhere than in the persons indicated by the document, just as other circumstances than possession may show that title to ordinary chattels is in others than the possessor. Such a process, always permissible when the question is raised only between

84. See footnote 65.

85. This is especially true since the mercantile theory was adopted in the Uniform Sales Act, the Warehouse Receipts Act, and the Bills of Lading Act, and these Acts have been adopted in more and more states.

the original parties, if still permissible after the document has been transferred to a purchaser for value in good faith without notice, makes such documents unsatisfactory as commercial documents on the faith of which to advance money. To facilitate the use of such documents in the business world, either for use as security for advances while the goods are in transit, or for ready sale of such goods in the interim by a negotiation of the document, the document itself must be more conclusive. By the mercantile theory of documents of title, adopted in many courts, therefore, the form of the document is conclusive and transferees may take it relying on the showing it presents as to who is the owner. By this means a great deal of business can be done without the necessity of tying up during the period of transit the amount of capital represented by the value of the goods shipped. The considerations applying here for making these documents more negotiable are thus analogous to those applying in the case of ordinary commercial paper—i.e., bills, notes, and checks. While our Code, in sections 6210-11, has purported to make such documents negotiable, the language is very general and is just like similar language in statutes of many other states which have been so narrowly construed that their effect is to leave the documents transferable, as under the common-law theory, but not negotiable in the sense of protecting a transferee for value without notice beyond the protection extended in a similar transfer of ordinary chattels.[86] Our local law on the subject, without decided cases in point, is therefore inconclusive. In order to establish the negotiability of such documents of title in accordance with the mercantile theory, to make it safe to advance money on such bills of lading, we need the specific provisions carrying this doctrine into effect which are contained in the Uniform Sales Act.[87]

g. *Auctions.* Section 21 (1) states, in statutory form, what is abundantly clear on principle and authority,[88] that where goods are put up for sale by auction, in lots, each lot is the subject of a separate contract of sale. On this point our Code is silent.

h. *Sale by a Person not the Owner.* Section 23 (1) states the fundamental doctrine of the law of property that no one can give

86. 101 U. S. 557, 25 L. ed. 892; 102 Minn. 147, 112 N. W. 1030, 1049; 99 Ala. 130, 12 So. 568; 64 Ark. 244, 41 S. W. 806; 18 Wash. 246, 51 Pac. 461; 29 Wis. 482. In a few cases a wider construction of such statutes has been given. See 118 La. 254; 53 Md. 612.

87. For detailed examination of the merits of each of the sections of the Uniform Sales Act bearing on the mercantile theory of documents of title and the authorities involved in regard to each, see Williston on Sales, secs. 405-444.

88. See 2 Taunt. 38; 124 Mass. 38; 94 Mo. 370.

what he has not. This doctrine is assumed[89] but nowhere expressly stated in our Code.

i. *Sufficiency of Delivery.* Section 43 (3) provides a definite rule as to what is to be regarded as sufficient delivery in case of sale of goods now in the possession of third parties, a question which has caused considerable confusion.[90]

j. *Delivery of Wrong Quantity.* Section 44 provides definite rules as to how the obligations of sellers and buyers are affected by delivery of a wrong quantity of goods. Definite rules, ascertainable in advance of litigation, to enable parties to adjust their dealings and controversies are in this particular very important, since it very often happens that the amounts delivered or tendered do not tally exactly with the amounts bargained for, and it is the uncertainty as to the legal effect of such discrepancies that leads to controversy and often leads to long-continued and expensive litigation. On this, again, our Code is entirely silent.

k. *Delivery in Installments.* Section 45 provides, in statutory form, a rule applying generally to contracts, what is the effect of delivery in installments. As the question is one involving the inquiry what is the contract the parties have made, the general rules stated are likely not entirely to do away with disputes as to their application.[91] Even granting that, however, it is better to have a rule to go by in disposing of such cases than to have to find a rule only at the end of a long course of litigation, as is now necessary in North Dakota, our Code being entirely silent on the question of delivery in installments under a contract to sell or a sale.

l. *Right of Inspection.* Section 47 (3) establishes that where the carrier is to collect on delivery of the goods the buyer has no right of inspection until after he has paid. This provision is in accord with decided cases[92] but we have nothing on the point in our local law in North Dakota.

m. *What Constitutes Acceptance.* Section 48 defines what constitutes acceptance of goods under a contract of sale, as intimation of acceptance, exercising acts of ownership, or retaining the goods. The inquiry whether the buyer has accepted the goods often becomes material, both under the Statute of Frauds, as a satisfaction of the statute, and under any inquiry whether the contract has been

89. See, for example, sec. 5508 of Compiled Laws, 1913.
90. See the discussion and authorities cited in Williston on Sales, sec. 454.
91. For some litigation under these rules, see below, footnote 120.
92. 46 Ia. 210.

performed. It is therefore desirable to have the law settled in regard to what amounts to acceptance of the goods under the contract of sale. Here, again, our Code is silent, but the Uniform Sales Act contains a definite rule which may be ascertained in advance of litigation.

n. *Acceptance as Related to Action for Damages.* Section 49 provides that acceptance of the goods does not bar action for damages if the goods do not correspond with the requirements of the contract. It thereby settles this question which is involved in much conflict of authority at common law. The North Dakota cases which we have on the question are in accord with the view adopted in the Uniform Sales Act.[93]

o. *Wrong Delivery.* Section 50 expresses a well-settled rule at common law, that the buyer is not bound to return goods wrongly delivered.[94] Our Code, however, is silent on the question. Similar remark may be made on section 51, covering the buyer's liability for failure to accept delivery.

p. *Definition of Unpaid Seller.* Section 52, definition of unpaid seller, is new to our Code. It is defined in the Uniform Sales Act for the sake of accuracy in dealing with the subsequent sections, giving the remedies of an unpaid seller.

q. *Lien after Part Delivery.* Section 55, providing for the unpaid seller's lien after part delivery, covers an important matter in regard to which the Code is silent.

r. *When Lien is Lost.* Section 56, providing how the unpaid seller may lose his lien, by delivery, waiver, etc., is also a specific provision in accordance with common-law principles and authority on matter in regard to which our Code is entirely silent.

s. *When Goods are in Transit.* Section 58, defining in detail when goods are in transit for the purposes of the law of stoppage in transit, is very much more complete than our Code, based on decided cases[95] involving various circumstances not dealt with in our Code at all.

t. *No Right to stop against Transferee of Documents for Value without Notice.* Section 59 (2) affirmatively provides that the bona fide transferee for value of an order bill of lading after an unpaid

93. See 5 N. D. 432, 67 N. W. 298; 11 N. D. 262, 91 N. W. 70.
94. See, for example, 161 Mass. 576, 581, 37 N. E. 742; 65 Ill. 512; 115 N. W. 636 (Minn.).
95. See the extended discussion and numerous authorities cited in Williston on Sales, secs. 523-539.

seller's notice to the carrier to stop the goods is to be protected. This is in accord with the mercantile doctrine of bills of lading, already set out in sections 27-40. On this question we have nothing definite in our Code, nor have we local cases on the subject.[96]

u. *Effect of Sale of Goods Subject to Lien or Stoppage in Transit.* Section 62, in providing that a sale of the goods by the buyer while they are in transit shall not cut off the seller's right to stop them, is stating a generally accepted rule[97] about which, however, our Code is silent. The last part of the section, protecting the transferee of an order bill of lading under such circumstances, while involved in some conflict of authority at common law,[98] expresses the correct view on principle, in accordance with the mercantile theory of bills of lading adopted in the Uniform Sales Act.

v. *Action for the Price.* Section 63 (2) expresses what is undoubted common law,[99] tho our Code is silent on the subject, that if the contract makes the price payable on a day certain, irrespective of transfer of title or delivery, the seller may recover the price, according to the terms of the contract, unless he manifests inability to perform or shows an intention not to perform. Such contracts are rare, apart from contracts of conditional sale, which are well known and constantly enforced by the courts.[100]

w. *Remedies for Breach of Warranty.* Section 69, consisting of various subdivisions, specifies far more completely than our Code what are the buyer's remedies for the seller's breach of warranty. Yet, with the exception of one subdivision, (1) (d), it is consistent with the general provisions found in our Code in Sections 7157-9. In parts it goes into much detail in regard to features as to which our Code is entirely silent, as in subdivisions (3), (4), and (5). In regard to subdivision (1) (d), which works a change in our Code, see below.[101]

x. *Effect of Uniform Sales Act on Right to Recover Interest and Special Damages.* Section 70 contains the provisions that the enactment of the Uniform Sales Act shall not affect the right to recover interest or special damages in any case where by law they may be recoverable. This is to guard against any undesigned change

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96. See footnote 51, previous article.
97. See, for example, 111 Mass. 490; 106 N. Y. 333, 13 N. E. 292.
98. See footnote 51, previous article.
99. See, for example, 164 Mass. 516.
100. Conditional Sales are recognized as a matter of course in North Dakota, as they are in other states generally. See 11 N. D. 198, 91 N. W. 39, 21 N. D. 608, 132 N. W. 351.
101. See p. 146.

in other parts of the law as a consequence of the enactment of the Uniform Sales Act.

y. *Interpretation.* (1) *General Provisions.* Sections 71-73 contain various rules of interpretation of the Act itself, quite in accord with accepted principles. Section 75 provides that the provisions of the Uniform Sales Act are not, unless so stated, applicable to mortgages. It was thought best not to attempt to deal with the peculiar rules of mortgage law as such in connection with the Uniform Sales Act, but to leave them to be dealt with, if so desired, by independent legislation.

(2) *Interpretation to secure Uniformity.* Section 74 provides that the Uniform Sales Act is to be so interpreted as to give effect to the purpose of uniformity. This principle is indispensable if the purpose of uniformity is to be consistently carried out,[102] and has already won recognition from several courts[103] among them the Supreme Court of the United States.

(3) *Definitions.* Section 76 provides a considerable list of definitions of terms used in the Act itself. In this respect the Uniform Sales Act follows the example set in the National Bankruptcy Act, in the Negotiable Instruments Law, and in other statutes, defining its own terms, so far as possible, to prevent confusion as to what they mean. In regard to these definitions in the Uniform Sales Act little or no question has been raised, except in the case of the definition of "value," the effect of which is considered below.[104]

2. Provisions Making More Specific Various Matters Already Contained in Our Code in a More General and Indefinite Form. Lack of adequate space in an article of the present character does not permit any detailed discussion of the merits of these provisions. For such discussion the reader is referred to the treatises. Such detailed discussion is here unnecessary, too, for recommending the Uniform Sales Act for adoption in North Dakota, since the matters in the following sections we have already. The Uniform Sales Act, in dealing with them, is better, however, since its provisions are more specific and therefore easier of application and better avoid litigation.

What the provisions are which substantially correspond may best be indicated by bringing them together in parallel colmuns. Where the provisions of the Uniform Sales Act not only make more

102. See Williston on Sales, sec. 617.
103. See footnote 120, for cases decided under sec. 74 of the Uniform Sales Act.
104. See page 153.

specific what is already exprest in general terms in our Code, but set out rules of law on matters in regard to which our law is silent, they have in the main been already dealt with above.[105] Where they produce or are likely to be alleged to produce affirmative changes in our law, they are dealt with below.[106] The following presentation of corresponding similar provisions is believed to be substantially correct, it being understood that the provisions of the Uniform Sales Act are usually more specific.

North Dakota Compiled Laws, (1913)	Uniform Sales Act
Sec. 6004	Sec. 1 and 9
" 5885-6	" 3
" 5962	" 4 (2)
" 5535	" 6
" 5951 and 5956	" 5
" 5854 and 5868	" 7 (1)
" 6005	" 9 (2)
" 5878	" 9 (4)
" 5982	" 13 and 14
" 5973	" 12
" 5987	" 13
" 5975	" 13
" 5974	" 15
" 5981	" 15 (1)(2)
" 5976	" 16 (a)
" 5535	" 17 and 18
" 6210-11 (part)	" 20 (1)
" 5996-97-99	" 21 (2)
" 6000	" 21 (4)
" 5969	" 22
" 7221 (part)	" 26
" 6209-11	" 27-29
" 5989	" 42
" 5969	" 43 (1)
" 5968	" 43 (1)
" 5967	" 43 (2) and (5)
" 5970	" 43
" 5972	" 43 (4)
" 5971	" 46
" 5990	" 47
" 5965	" 53 and 54
" 6864	" 54
" 6864 and 6881	" 53 (2)
" 6881	" 57
" 6883	" 58
" 6884	" 59

105. See pages 126-133.
106. See pages 144-154.

Sec. 5966	Sec. 61 (1), 65
" 5936	" 61 (2)
" 7155	" 63 (1)
" 7146, 7156	" 64
" 7191—7193	" 68
" 7157—7159	" 69 (6) and 69 (7)

3. PROVISIONS EMBODYING THE RULES CONTAINED IN OUR CODE IN SUBSTANTIALLY THE SAME FORM. Comments on these provisions are for the present purpose obviously unnecessary. The provisions need only be brought together in parallel columns.

NORTH DAKOTA COMPILED LAWS, (1913)	UNIFORM SALES ACT
Sec. 5950, 5952-55	Sec. 1
" 5966	" 53 (a), 53 (d)
" 6881	" 53 (b), 57

4. PROVISIONS MAKING SUBSTANTIAL CHANGES IN OUR CODE. These provisions are few in number. The changes they make are dealt with below[107] showing that in most cases these changes are not radical but are in accord with common-law principles and are usually desirable changes to make even on their own merits.

From this survey of the principal provisions of the Uniform Sales Act which give us definite rules of law where our present Code is silent or indefinite, it is easily apparent that the enactment of the Uniform Sales Act would greatly tend to make our local law more certain. True, we have not only the Code but also reports of decided cases in North Dakota, but in regard to most of the rules dealt with in the Uniform Sales Act our Supreme Court has not yet spoken.[108] We are usually constrained to rely either on the Code we have, which is often inconclusive or silent on the question in hand, or we must rely on the common-law authorities generally, which are usually more or less conflicting, necessitating our litigating every point anew and appealing it to the Supreme Court for final decision. The enactment of the Uniform Sales Act, which is a definite codification of common-law results, would therefore give us not only greater certainty than we have in our present Code, but also greater certainty than we could hope to attain thru our case law even by many years of continuous litigation.

107. See footnote 106.
108. See page 62, previous article.

F. OBJECTIONS TO THE ADOPTION OF THE UNIFORM SALES ACT ANSWERED

I. Objections Based on Distrust of Codification

1. In General. The average lawyer, trained under our common-law system, is apt to be imbued with a sort of instinctive distrust of codification, which, when analyzed, is found to rest upon some conviction that codification makes the law too rigid and projects the moribund ideas of the time over future generations.[109] For the purposes of this article the correctness of such views in regard to codification need be neither affirmed nor denied. Living under the Field Code, which is a crude codification, we suffer already whatever evils of this nature codification is calculated to bring about. Lawyers and judges in trial practise, however, constantly lean on the Code as now existing, and show no disposition to abandon it as a practical guide in litigation. The ordinary citizen who is not a lawyer, far from being averse to the principle of codification, welcomes the project as a step in reducing the law to certainty, expecting thereby the more readily to adjust his conduct to conform to the law and thus avoid litigation. Whether the objections to codification are right or wrong, therefore, our local situation actually is that we have it, that our people approve it, that the members of our legal profession practise under and rely upon it, and that the objections to it are felt most strongly, not by our own people or lawyers who have experienced its effects, but by those who have been trained apart from the codes, whose actual experience with codified law is negligible, and whose views on the question are derived rather from academic reflection than from practical experience.

In view of our actual local situation, therefore, the fact that the Uniform Sales Act is an act of partial codification should rather commend than condemn it in the eyes of our people, while the fact that it is a thoro, improved, and up-to-date codification of the subject dealt with should, as a practical matter, commend it both to supporters of the principle of codification and to its opponents. Those who support the principle of codification can welcome the Uniform

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109. For authorities on the effect of codification generally, see, especially, Savigny, Von Beruf, Unserer Zeit für Gesetzgebung und Rechtswissenschaft (On the Vocation of our Age for Legislation and Jurisprudence) against codification, and Austin, Jurisprudence, Lecture 39, in its favor. Also see Carter, Law: Its Origin, Growth, and Function, Lects. 11, 12. While the average lawyer who distrusts codification ordinarily has not precisely formulated his objections, they are usually based upon some one or more of the considerations dealt with at length by these writers and briefly adverted to in the text. For a bibliography of the literature of codification, see Pound's Outlines of Lectures on Jurisprudence, Lect. XIV.

Sales Act as a new improvement upon the Code, a piece of machinery for the administration of justice which in their opinion has accomplished much good in the past and which will accomplish much more in the future. Those who object to the principle of codification may equally welcome the Uniform Sales Act as an improvement upon a code which in their opinion has already both made our law rigid and projected upon us the ideas of the past. Whether one is disposed to commend or to condemn the principle of codification, therefore, he may, where codification of a sort already is an accomplished fact, support the project for systematic thoro revision to bring the existing codification into accord with the law of the time.

2. DISTRUST OF THE PARTICULAR MESURE SUBMITTED. Objections to the Uniform Sales Act may be raised on more practical grounds than mere distrust of the principle of codification. It may be objected that tho some codification of the law of sales might be desirable, yet that this particular Act, recommended by the Commissioners on Uniform State Laws, is defective on various grounds, a couple of which may here be briefly answered.

a. *In Operation will this Uniform Sales Act really Produce Uniformity?* Some have said that the Negotiable Instruments Law failed to produce uniformity and have asked the question: "Can any better be expected of the Uniform Sales Act?" While it may be granted that the Negotiable Instruments Law might in some respects be improved,[110] it is generally conceded that its effect has been salutary,[111] that in many points it has produced uniformity,[112] and that nowhere among the states which have adopted it is there any thought of its repeal. In our own state the Negotiable Instruments Law has been in force for some seventeen years, no repeal is contemplated, and its effect has admittedly been, not only to make our law of negotiable instruments uniform with that of other states, but also to make our law of negotiable instruments more certain than it was before.[113] If such salutary effects could be produced by the Negotiable Instruments Law, which was rather hastily drawn, without much consultation or extended criticism,[114] much more may be expected of the Uniform Sales Act, which was drawn by an expert

110. See the Ames-Brewster controversy, in Brannan's Negotiable Instruments law.
111. See, for example, Domestic Commerce and Uniform State Laws, by S. R. Child, in "The Nation's Business," June, 1916.
112. See, for example, the provisions of the Negotiable Instruments Law, sections 85, 89, 124. Others with similar effect are mentioned in Brannan's Negotiable Instruments Law, (2nd. ed.), p. 164.
113. Comparison of the present code sections on Negotiable Instruments with those they superseded will amply bear out this remark, there being but few local cases as yet decided by our court.
114. See footnote 110.

after mature deliberation, and several times revised in the light of the most searching and intelligent criticism the country affords.[115]

A further consideration to show that the Uniform Sales Act actually produces uniformity is found in the seciton of the Act itself providing for its being so construed as to effectuate the general purpose to make uniform the law of those states which enact it.[116] No corresponding provision is found in the Negotiable Instruments Law. This provision has already been acted upon by the courts and is upheld even by the Supreme Court of the United States.[117]

b. *Instead of Making the Law more Certain, will it make the Law more Uncertain?* It has already been shown above[118] that on many points the Uniform Sales Act will give us definite rules of law where with our present Code and decided cases we have no certainty at all. Despite such a showing, however, it is sometimes contended that any attempt to codify the law will have precisely the opposite effect, to render the law more uncertain than ever.[119] The argument to establish so strange a proposition is that tho the rule may be phrased in definite language, stated in so many words, its meaning in application only the courts can determine thru the process of litigation, and that until a line of cases under the formal rule has been developed no one can tell what the court will do, there being no cases showing what the court has already done under similar circumstances.

The answer to this argument as applied to the Uniform Sales Act, so far as it needs any answer, is three-fold. First, the Act was carefully drawn as a codification of already existing case law. It does not, therefore, introduce novel or peculiar doctrines in regard to which there is no way of forecasting what the position of a court, in the application of them to actual litigation, would turn out to be. There is nothing new or startling in the Uniform Sales Act, but its contents are based thruout on the results which have been worked out thru the courts in the process of actual litigation based upon the pre-existing and generally prevailing principles of the common law. The problem of forecasting from the past what a court should do in the future will therefore not be markedly different when new situations arise under the Uniform Sales Act from what it would be under the ordinary case law situation.

The second answer to the objection that the Uniform Sales

115. See above, p. 57.
116. Uniform Sales Act, sec. 74.
117. See footnote 103.
118. See pages 126-133.
119. Such is, for example, the argument in Carter, Law: Its Origin, Growth, and Function.

Act might render our law more uncertain rather than more certain is found in the course of decisions in the states which have already adopted it. In several states the Act has now been in force for a number of years. Litigation on the questions dealt with has often taken place. The courts have decided cases under the Act, have found no difficulty in applying it to actual litigation, and have experienced no difficulty in seeing what it means.[120]

120. Of the considerable number of cases already decided under the Uniform Sales Act in states where it has been adopted, most of the cases involve no question of doubt as to the meaning of the statute, but are cases applying the law to the facts. Some citations, mostly gathered by Professor Williston, of cases under different sections of the Uniform Sales Act are for the sake of completeness here reproduced.

Section 4

Prested Miners Co. v. Garner (1910) 2 K. B. 776;
Goldowitz v. Kupfer, 141 N. Y. Supp. 531;
Willard v. Higdon, 91 Atl. 577, (Md.);
Peck v. Abbott & Fernald Co., 111 N. E. 890, (Mass.);
Davis v. Blanchard, 138 N. Y. Supp. 202;
McAusland v. Rieser, 90 Atl. 261, (N. J.).

Section 8

Automaitc Time Table Advertising Co. v. Automatic Time Table Co., 94 N. E. 462, (Mass.).

Section 9

Cobb, Bates & Yerxa Co. v. Hills, 94 N. E. 265, (Mass.).

Section 12

Nelson Co. v. Silver, 145 N. Y. Supp. 124;
Debany v. Rosenthal, 152 N. Y. Supp. 1043;
Gascoigne v. Cary Brick Co., 104 N. E. 734, (Mass.).

Section 13

Carbolineum Wood Preserving Co. v. Carter, 50 N. J. L. J. 361;
(N. Y. Munic. Ct.) commented on in 27 Harv. L. Rev. 287;
Dreisbach v. Eckelkamp, 83 Atl. 175, (N. J. L.).

Section 14

Lissberger v. Kellogg, 73 Atl. 67, (N. J.).

Section 15

Leiter v. Innis, 138 N. Y. Supp. 536;
G. B. Shearer Co. v. Kakoulis, 144 N. Y. Supp. 1077;
Wasserstrom v. Cohen, 150 N. Y. Supp. 638;
Kansas City Bolt Co. v. Rodd, 220 Fed. 750 (C. C. A.);
Pentland v. Jacobson, 155 N. W. 468, (Mich.);
Gearing v. Berkson, 111 N. E. 785, (Mass.);
Marx v. Locomobile Co., 82 N. Y. Misc. 468, 144 N. Y. Supp. 937;
Quemaponing Coal Co. v. Sanitary, etc., Co. 95 Atl. 986. (N. J.);
Ohio Electric Co. v| Wis. & Minn. L. & P. Co., 155 N. W. 112, (Wis.);
Bonwit-Teller v. Kinlen, 150 N. Y. Supp. 966;
Sure Seal Co. v. Loeber, 157 N. Y. Supp. 327;
Matteson v. Legace, 89 Atl. 713, (R. I.);
Proctor v. Jacobson, 155 N. W. 468, (Mich.);
Proctor v. Atlantic Fish Co., 94 N. E. 281, (Mass.).

Section 16

Stewart v. Voll, 79 Atl. 1041, (N. J.).
Gascoigne v. Cary Brick Co., 104 N. E. 734, (Mass.).

Section 17

Isaacs v. MacDonald, 102 N. E. 81, (Mass.).

Section 18

Bondy v. Hardine, 102 N. E. 935, (Mass.).

Section 19

Automatic Time Table Adv. Co. v. Automatic Time Table Co., 94 N. E. 462, (Mass.);
J. B. Bradford Piano Co. v. Hacker, 156 N. W. 140, (Wis.);

George A. Ohl & Co. Inc. v. Barnet Leather Co., 93 Atl. 715, (N. J. L.);
Bondy v. Hardine, 102 N. E. 935, (Mass.);
Sanitary Carpet Cleaning Co. v. Reed Mfg. Co., 145 N. Y. Supp. 218, 223.

Section 22

Schang v. Bramwell, 143 N. Y. Supp. 1057;
Collerd v. Tully, 80 Atl. 491, (N. J.);
O'Neil-Adams Co. v. Eklund, 93 Atl. 524,(Conn.);
Dinsmore v. Moag-Wahmann Co., 89 Atl. 399, (Md.).

Section 28

See Roland M. Baker Co. v. Brown, 100 N. E. 1025,(Mass.);
In re Richheimer, 221 Fed. 16, (C. C. A.).

Section 33

See on corresponding section of Warehouse Receipts Act.
Rummell v. Blanchard, 216 N. Y. 348; 110 N. E. 765.

Section 38

Roland M. Baker Co. v. Brown, 100 N. E. 1025, (Mass.);
See on corresponding section of Bills of Lading Act, which is practically identical,
Commercial Nat. Bank v. Canal Louisiana Bank, 239 U. S. 520.

Section 42

Gruen v. Ohl, 80 Atl. 547, (N. J.);
Bridgeport Hardware Mfg. Corp. v. Bouniol, 93 Atl. 674, (Conn.).

Section 43

Lenders v. Fahlberg Works, 150 N. Y. Supp, 635;
Bridgepart Hardware Mfg. Co. v. Bouniol, 93 Atl. 674, (Conn.);
Schiff v. Winton Motor Car Co., 153 N. Y. Supp. 961, 964 (App. Term);
Dordoni v. Hughes, 85 Atl. 353, (N. J.);
Gruen v. Ohl, 80 Atl. 547, (N. J.);
Stephens-Adamson Co. v. Bigelow, 92 Atl. 398, (N. J.).

Section 44

Boyd v. Second Hand Supply Co., 123 Pac. 619, (Ariz.);
Kirshman v. Crawford-Plummer Co., 150 N. Y. Supp. 886;
Shipton v. Weil, (1912) 1 K. B. 574.

Section 45

Commercial Casualty Co. v. Rice, 157 N. Y. Supp. 1;
Quarton v. Am. Law Book Co., 121 N. W. 1009, 1013, (Ia.).

Section 46

Schanz v. Bramwell, 143 N. Y. Supp. 1057;
Haupman v. Miller, 157 N. Y. Supp. 1104;
Miller v. Harvey, 144 N. Y. Supp. 624;
Wimble v. Rosenberg, 57 Solic. Jl. 392, 784.

Section 47

Gerli v. Mistletoe Silk Mills, 76 Atl. 335, (N. J.);
Bridgeport Hardware Mfg. Co. v. Bouniol, 93 Atl. 674, (Conn.);

Section 48

Gerli v. Mistletoe Silk Mills, 76 Atl. 335, (N. J.);
Salomon v. Olkin, 154 N. Y. Supp. 204.

Section 49

Marx v. Locomobile Co., 144 N. Y. Supp. 937;
Shearer Co. v. Kakoulis, 144 N. Y. Supp. 1077;
Nelson Co. v. Silver, 145 N. Y. Supp. 124;
Levy v. John C. Dettra Co., 154 N. Y. Supp. 176;
English Lumber Co. v. Smith, 157 N. Y. Supp. 233;
Gascoigne v. Cary Brick Co., 104 N. E. 734, (Mass.);
Rothenberg v. Shapiro, 140 N. Y. Supp. 148;
Kugleman v. Ritter, 152 N. Y. Supp. 1027;
Regina Co. v. Gately Furniture Co., 154 N. Y. Supp. 888;
Interboro Brewing Co. v. Independent Ice Co., 156 N. Y. Supp. 411,
Leiter v. Innis, etc., Co., 138 N. Y. Supp. 536.

Section 50

Putnam v. Bolster, 216 Mass. 367, 373, 103 N. E. 942.

Section 51

Roppenberg v. Owen, 146 N. Y. Supp. 478.

The third answer to this objection, if any further answer is needed, is that our present law is now so uncertain in many respects,[121] often with no announced law on the particular subject at all, either in the present Code or in the decisions of the courts, that, even granting the merit of the objection, we will gain rather than lose by adopting a statute which does furnish definite rules of law for many important questions.

As to this objection that the Uniform Sales Act would actually increase uncertainty, therefore, it may be shortly answered that our present law could hardly be made more uncertain than it already

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Section 58

Northern Grain Co. v. Wiffler, 153 N. Y. Supp. 723, (N. Y. App. Div.);
Rummell v. Blanchard, 153 N. Y. Supp. 159, (N. Y. App. Div.);
Also see 216 N. Y. 348, 110 N. E. 765.

Section 60

Putnam v. Bolster, 216 Mass. 367, 373, 103 N. E. 942;
Churchill Grain Co. v. Newton, 89 Atl. 1121, (Conn.).

Section 61

Boyd v. Second Hand Supply Co., 123 Pac. 619, (Ariz.).

Section 62

Mordaunt v. British Oil & Coke Mills (1910) 2 K. B. 502.

Section 63

Illustrated Postal Card Co. v. Holt, 81 Atl. 1061, (Conn.);
Home Pattern Co. v. Mertz Co., 86 Atl. 19, (Conn.);
Home Pattern Co. v. Mertz Co., 90 Atl. 33, (Conn.);
Also see 223 Fed. 698.

Section 64

Home Pattern Co. v. Mertz Co., 86 Atl. 19, (Conn.);
Bixler v. Finkle, 88 Atl. 846, (N. J.);
Varley v. Bedford, 156 N. Y. Supp. 597.

Section 67

Gruen v. Ohl, 80 Atl. 547, (N. J.);
Pope v. Ferguson, 83 Atl. 353, (N. J.).

Section 69

Gerli v. Mistletoe Silk Mills, 76 Atl. 335, (N. J.);
Borden v. Fine, 98 N. E. 1073, (Mass.);
Marx v. Locomobile Co., 144 N. Y. Supp. 937;
G. B. Shearer Co. v. Kakoulis, 144 N. Y. Supp. 1077;
Regina Co. v. Gately Furniture Co., 154 N. Y. Supp. 888;
Impervious Products Co. v. Grey, 96 Atl. 1, (Md.);
Miller v. Zander, 147 N. Y. Supp. 479;
Frieder v. Rosen, 147 N. Y. Supp. 442;
Silberstein v. Blum, 153 N. Y. Supp. 34;
Salomon v. Olkin, 154 N. Y. Supp. 204;
Interboro Brewing Co. v. Independent, etc., Ice Co., 144 N. Y. Supp. 820;
Lewistown, etc., Co. v. Hartford Stone Co., 110 N. E. 515, (Ohio);
Coast Central Milling Co. v. Russell Lbr. Co., 89 Atl. 898, (Conn.).

Section 71

Re Walkers v. Shaw, (1904) 2 K. B. 152.

Section 74

Pope v. Ferguson, 83 Atl. 353, (N. J.);
Felt v. Bush, 126 Pac. 688;
Roland M. Baker Co. v. Brown, 214 Mass. 201, 100 N. E. 1025;
Also see 239 U. S. 520, 36 Supr. Ct., 194 at p. 197.

Section 76

Boyd v. Second Hand Supply Co., 123 Pac. 619, (Ariz.);
Willard v. Higdon, 91 Atl. 577, (Md.).

121. See above, p. 62.

is, that there is no reason for anticipating an increase in uncertainty since this Act is based thruout on decided cases, and that in practise under the Uniform Sales Act no such result has actually occurred.

3. Objections to Codification of this Particular Branch of the Law. In some quarters the contention is made that while codification of certain branches of the law may be desirable, yet in other branches codification would as a practical matter be futile and the results of attempted codification in such branches undesirable. For example, it will be admitted that it is practicable and perhaps desirable to codify the rules of law relating to property, because they change at best very slowly and great importance is attached to their stability. On the other hand, it will be suggested that any codification of the modern law of torts would be futile, it being still so largely formative in its character. That there is sound sense in taking such a position may also for present purposes readily be granted.

The answer to that position, if it is relied upon to oppose the adoption of the Uniform Sales Act, however, is that the rules applicable to sales transactions are really rules of property. In sales transactions, as in other dealings with property, rather than to have great flexibility with its consequent uncertainty, it is important to have such certainty that business can be carried on with reasonable security.[122]

II. Objections Based on Fear that the Uniform Sales Act will Change the Rules of Law Already Announced in North Dakota

The most serious objection to be raised against the adoption of the Uniform Sales Act in North Dakota is that it would work changes in our law as already announced. Lawyers, especially, will be prone to hesitate at the adoption of an Act with which they are not entirely familiar, preferring to put up with the evils they have rather than jump to others they know not of. That such an attitude is sound may be granted without thereby consenting that absolute stand-patism is always on every occasion preferable. To be skeptical and require to be shown is very different from the uncompromising attitude which tolerates no change whatever. To the reasonable person it may be shown that the fear of making a few slight changes in the already existing rules of law should not stand in the way of adopting the Uniform Sales Act in North Dakota and securing the benefits of uniformity and certainty which

122. See above, p. 67.

would follow. The demonstration that any such fear is unwarranted rests on several grounds, which will here be briefly dealt with in turn.

1. LEGISLATIVE CHANGES IN THE EXISTING LAW NOT ANOMALOUS BUT USUAL. That the fear of changing existing law as such is inconsequential in our modern states is apparent from all our legislative history. Legislatures commonly meet every two years, and Congress meets every year for the avowed purpose of enacting new laws as well as for the purpose of providing appropriations to carry on the governmental machinery. At every session of these bodies new laws of one kind or another are passed.[123] If these laws are desirable as a matter of intrinsic merit in the situation to which they are to be applied, the mere fact that they change the pre-existing law is not allowed to stand in the way of their enactment. Such being the situation, in regard to proposed legislation generally, the mere fear that the Uniform Sales Act might change some existing law should not be regarded as intrinsically important, unless definite objections appear to the changes actually brought about.

2. THE CHANGES IN OUR PRESENT CODE, WHICH WOULD BE PRODUCED BY THE UNIFORM SALES ACT NOT OBJECTIONABLE. a. *Substantial Changes not Numerous.* The sections in our present Code which would be displaced by the provisions of the Uniform Sales Act are embraced almost altogether in Chapters 57 and 58, numbered from section 5950 to 6006 inclusive. Of the sections in these chapters several would not be touched at all, as they deal with matter outside the range of the Uniform Sales Act. Such are sections 5957-5960, 5963, 5964, 5986, 5991-5993, 6002, and 6006, which, therefore, would remain in our Code as before and not be repealed at all.

Of the other sections in these chapters which would be repealed, a large number, as has been explained above,[124] are contained in the Uniform Sales Act either in substantially the same form or in a more satisfactory form because more specific. Such are sections 5950, 5952-5955, 5962-5969, 5971-5976, 5987, 5989, 5990, 5996, 5997, 5999, 6000, and 6005. The remaining sections in this part of the Code, which would be replaced by the Uniform Sales Act, nearly all relate to the law of warranty in sales. These are sections 5977-5985, 5988, and 5994. Besides these, there are section 5961, on the Statute of Frauds, section 5966, the part on how the

123. See above, p. 58.
124. See pages 133-135.

unpaid seller may enforce his lien, and sections 5998 and 6001, on auctions. For the sake of completeness, mention must also be made of section 6003, a definition of barter, which is not contained in so many words in the Uniform Sales Act. The definition in our Code, however, is of no value, and has never become the basis for any North Dakota court decision.

Sections scattered elsewhere thruout the Code are very rarely affected by the Uniform Sales Act. Of these only Section 5888 (4) and sections 7153-7159 would need to be repealed. Two others, sections 4340 and 5880, would be somewhat modified in application.[125] Sections 7153-7159 dealing with the mesure of damages in sales and warranty are, with one exception noted below,[126] substantially re-enacted in the Uniform Sales Act. Section 5888 (4) is substantially a duplicate of section 5961, on the Statute of Frauds, and would be affected in the same way.[127]

From this cursory review it is apparent that the principal changes which the Uniform Sales Act would make in our Code is in the law of warranty in sales with a few minor changes in regard to the Statute of Frauds, manner of enforcement of the seller's lien, auctions, infant's right to avoid a sale, and sales at a valuation. The effect of these several changes is dealt with below.[128] Aside from these few changes, most of which are of a minor character, the Uniform Sales Act either re-enacts more specifically the law we already have in our Code in more indefinite form, or it definitely specifies, on the basis of the generally prevailing common law, rules of law to cover numerous situations often arising which are not dealt with by our Code at all.

a. *The Substantial Changes not Radical, but generally Improve our Local Law.* (1) *General Considerations.* That the changes made in our Code by the Uniform Sales Act are not radical may be inferred, even without any minute comparison of the detailed provisions, from the fact that the Uniform Sales Act is a careful codification of the common law prevailing generally in this country, based thruout on decided cases. Our Code, also, is an attempt to codify the common law. Both, then, rest upon the same basic foundation, and depend for their underlying principles on the same body of case law. The Uniform Sales Act, to be sure, is a more recent codification, and includes much matter drawn from cases decided since the Field Code was drafted. Those new cases, however, were

125. See page 151.
126. See page 150.
127. See page 148.
128. See pages 144-152.

decided according to common-law principles, deduced from the pre-existing authorities, and introduced nothing strange and startling into the law. It is therefore no accident, but a natural consequence, that even close comparison between the Uniform Sales Act and our present Code discloses so few marked diversities between them, tho it does disclose very conspicuously that the Uniform Sales Act is much more complete and specific in its provisions. Even in the few cases where substantial affirmative changes are made in the Code by the Uniform Sales Act, it may be inferred, in the light of these facts, that the changes are not of a startling but of a very moderate character.

A little detailed examination of these changes will confirm the conclusion that the changes in question are not radical, and that they are usually worth making on their own merits, even apart from the question of whether the Uniform Sales Act should be adopted to secure uniformity and certainty generally.

(2) *The Law of Warranty.* Section 15 of the Uniform Sales Act produces a more marked change in our Code than any of the other sections. Even in this section, which deals with implied warranties of quality, the general manner of dealing with the question is the same as in our Code—namely, that there is no implied warranty, apart from the categories especially dealt with in the statute. The categories, however, are somewhat different.

Under sections 5979 and 5980 of our Code the warranty dealt with is confined to the manufacturer. Under section 15 (1) of the Uniform Sales Act the warranty is implied in a sale, whether the seller is a manufacturer or not, if the buyer relies on the seller's skill and judgment.

Section 15 (2) of the Uniform Sales Act covers the matter dealt with in Sections 5978, 5981, and 5985 of our Code changing the law of section 5978 by leaving out any reference to deterioration after shipment, and changing the law of section 5985 by making the warranty apply regardless of whether the buyer buys for immediate consumption or for resale.

Section 15 (3) of the Uniform Sales Act changes the law of section 5981 by referring only to actual examination of the goods instead of opportunity to examine.

Sections 12 and 15 (1) of the Uniform Sales Act also modify section 5988, by permitting a warranty against known defects if the buyer relies upon the seller's skill and judgment in the matter. This is often important in cases of doubt and difficulty on the part of the buyer in regard to appreciating the seriousness of defects.

Section 5994 of our Code provides that a breach of warranty entitles the buyer to rescind a contract of sale but not an executed sale, "unless the warranty was intended by the parties to operate as a condition." It has also been difficult under this section to determine what the qualification meant.[129] It is a better rule, on the merits, to let the buyer rescind either a contract of sale or an executed sale, if there is a breach of warranty. That leaves the question of whether there can be a rescission to depend alone on the question whether the warranty has been broken, a result which is far preferable since the questions of what conditions were intended to be included and just at what moment title was intended to pass are so often obscure, the parties in their bargain not having adverted specifically to those matters at all. This section of our Code would be changed by the Uniform Sales Act, section 69 (1) (d) to letting the buyer at his election rescind or sue for breach of warranty, whether title has passed or not.

The general effect of these changes in the law of warranty is to make the law of warranty somewhat more stringent on the seller than before. This is quite in accord with the tendency shown at common law in more recent times, as well as with the tendency shown in our own recent legislation.[130] It will be remembered that in the earlier common law the law of implied warranty was very much restricted, and that as time has gone on its range has been more and more extended. The Uniform Sales Act, being based on the common law of the present, therefore usually goes farther in this respect than does our Code which was drawn up more than fifty years ago. For further discussion of the intrinsic merits of this particular development, as for discussion of the intrinsic merits of other provisions of the Uniform Sales Act, reference must be made to the treatises.[131]

A few further changes in the Code, mostly minor in their nature, connected with the law of warranty, must be mentioned. Under the Uniform Sales Act sections 5977, 5983, and 5984 of our Code would be repealed. Section 5977 is in part covered by section 15 (1) of the Uniform Sales, Act, but not as to the seller's warranting his own good faith in the transaction. Such a warranty is unnecessary since bad faith here would in any case give rise to a cause of action for fraud, and unless there were bad faith there would be no breach of warranty under this section. Such a warranty, too, is unknown to

129. See 14 N. D. 419, 105 N. W. 92; 21 N. D. 575, 132 N. W. 137; 159 N. W. 2, (N. D.).
130. See Compiled Laws (1913) sections 5991-5993 and section 6002, which were recently added to our Code.
131. See footnote 71.

the common law of sales, and was equally so unknown at the time section 5977 was originally introduced into the Field Code.[132] Further, no case involving any warranty in sales of goods under this section has arisen in the fifty odd years of this section's useless existence on the statute book, either in North Dakota[133] or California.[134] It would therefore do no violence to the law of North Dakota to have section 5977 repealed without substantial re-enactment in the Uniform Sales Act.

Section 5983 of the present Code which would also be repealed without substantial reenactment in the Uniform Sales Act is reasonably covered by Section 14 of the Uniform Sales Act if the sale is by description, and is also partly covered by section 15 (1) and (2). So far as section 5983 of the Code goes beyond these portions of the Uniform Sales Act it is either unimportant or mischievous, since the marks referred to may be wholly immaterial, forming no part of the description or of the inducement to buy and being in no wise relied on. Further, its unimportance is shown by the fact that since the Field Code was adopted no cases have been decided in reliance on this section, either in California[135] or North Dakota.

Section 5984 of the Code is not contained in any corresponding form in the Uniform Sales Act. It may be properly omitted from the sections of the statute relating to sale, however, since it deals with negotiable instruments only, was drafted as a codification of some cases relating to negotiable instruments[136] and is substantially contained in the Negotiable Instruments Law, appearing in that connection in our Code as part of section 6950. It should be noted, in confirmation of this view, that the only case decided in North Dakota under this section was a case involving a negotiable instrument.[137] It is therefore no objection to the adoption of the Uniform Sales Act which deals with the sale of ordinary chattels, not with bills and notes, that this section would disappear from the sections of the statute dealing with ordinary sales.

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132. In the Commissioners' note to the original Draft Civil Code of New York (The Field Code) the cases cited do not stand squarely for any such proposition as they are cited to support. In only one of them, 20 N. Y. 287, does even the language mesurably bear it out, and that is a case of negotiable instruments in its turn citing, for its support, Story on Promissory Notes, sec. 118.

133. One North Dakota case, 19 N. D. 317, at p. 326, 124 N. W. 64, refers to this code section merely to assure that the case in question was not within its provisions and that it therefore could have no application.

134. See Kerr's Cyc. Codes of Cal., Civil Code, sec. 1767 and notes.

135. See Kerr's Cyc. Codes of Cal., Civil Code, sec. 1773 and notes.

136. See the cases cited by the Code Commissioners under sec. 888 of the Draft Civil Code of New York: 4 El. & Bl. 133; 4 Gray 156; 15 Johns. 240; 2 El. & Bl. 849; 1 Hill. 287; 20 N. Y. 226; 15 id. 437; 2 Bing. (N.C.) 724; 4 Scott 849; 20 N.Y.287.

Parts of this section were early repealed in California. See Kerr's Cyc. Codes of Cal., Civil Code, 1774, and notes thereto.

137. See 24 N. D. 645, 140 N. W. 725, 47 L. R. A. (N.S.) 246.

(3) *Auctions.* Section 21 of the Uniform Sales Act, while strictly in accord with the common law in the matter, changes section 5998 of our Code which provides that when a sale is made by auction upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own interest. No such provision is contained in the Uniform Sales Act. Such provision, too, tho cited by the Field Code commissioners as based on decided cases, is apparently opposed to the common law in this country.[138] It has never become the basis for any case law in North Dakota, nor have any California cases under it decided what sort of modifications will be held good under it as made for the auctioneer's own benefit.[139] Our law would therefore lose nothing of importance, but would gain in certainty by the repeal of section 5998 of the Code and the adoption of the provisions of the Uniform Sales Act in its stead.

(4) *Statute of Frauds.* Section 4 of the Uniform Sales Act slightly changes section 6001, as it changes section 5888 (4) on the same point. The parts of the Code referred to say that the auctioneer's entry is binding on the parties the same as if made by themselves. Such is also the common law embodied in section 4 of the Uniform Sales Act except in cases where the auctioneer is himself interested as a seller.[140] This qualification would probably be read into the present Code also.[141] No local case has been decided under this part of the sections. This change in the Code, if indeed it amounts to any change at all, is therefore not a worthy objection to the adoption of the Uniform Sales Act.

Section 4 of the Uniform Sales Act also changes the expression in sections 5888 and 5961, that "no sale is valid unless," etc. to "shall not be enforceable by action, unless," etc. The distinction between the two expressions is merely formal. Under either form it has been held that such sales, without the proper memoranda to satisfy the Statute of Frauds, may be shown for other purposes so long as it is not attempted to enforce them affirmatively by action.[142]

Section 4 of the Uniform Sales Act makes a further change, which is more substantial, in sections 5888 (4) and 5961 of our

138. See 24 L. R. A. (N.S.) 488.
139. See annotations under sec. 1795, Kerr's Cyc. Codes of Cal., Civil Code.
140. See, 9 Gray 397, 69 Am. Dec. 295; 45 Mo. 444, 100 Am. Dec. 385.
141. See, for example, 1 Cal. 415, under the identical section in California, that the auctioneer is agent of the parties for this purpose only at the time of sale, not afterwards, which is a common-law proposition.
142. See, for example, 5 S. D. 53, 58 N. W. 8, treating the case thruout as if the language were "unenforcible" and even reciting in terms that the two expressions are equivalent. Many authorities on the question are cited in Williston on Sales, sec. 71.

Code, in changing the amount fixt by the statute from $50 to $500. This change is based on such considerations as that $500 more nearly represents at the present time the value that £10 represented in the original English Statute of Frauds, and that it may be questioned whether in small transactions, where the custom of reasonable men does not prescribe a writing, the Statute of Frauds does not cause more fraud than it avoids.[143] The American statutes in the various states have usually but not always fixt the amount at $50, while one, in Florida, fixes no limit at all. With the steadily rising prices this absolute amount of course makes the statute actually applicable to smaller and smaller transactions. In a few of the states which have adopted the Uniform Sales Act the amount prescribed by the Act has been changed, tho the old figure of $50 has not always been retained.[144]

Section 4 of the Uniform Sales Act also contains the merely formal change of using the term "of the value of" instead of "of the price of" as in our Code. This change in the wording does not produce any substantial change, the word "price" having universally been liberally construed in the American cases to cover barter as well as sales transactions.[145]

(5) *Enforcement of Seller's Lien.* Section 60 of the Sales Act changes our Code provision, section 5966, on the enforcement of the seller's lien. Our Code provides that the unpaid seller, to enforce his lien, may sell as in the case of pledge. Sections 6785-6789 provide that in case of sale of pledged property, the pledgee must first demand performance of the pledgor "if he can be found," and must give actual notice of the time and place of sale at such a reasonable time before the sale as will enable the pledgor to attend the sale, and the sale, when made, must be made by public auction. These provisions applicable to pledge would still remain in the Code after the adoption of the Uniform Sales Act, but would no longer be applicable to the case of an unpaid seller enforcing his lien. The provision of the Uniform Sales Act on the subject permits the unpaid seller, after the buyer's default has lasted an unreasonable time, to

143. See Williston on Sales, sec. 70.
144. See footnote 143.
145. Our present Code, in sec. 6004, gives the same effect, in providing that this provision of the Statute of Frauds applies to barter if the value is $50 or more. Some situations might be imagined where it would make some difference whether the word "price" or the word "value" was used in the statute, as for example, whether "value" is the value put on the article by the parties or by a reasonable person. Since we have already, under section 6004, whatever difficulties this inquiry can bring, as the difference can become practically important only in the case of barter, its presence is no objection to the adoption of the Uniform Sales Act.

sell again without formalities, and without notice to the defaulting buyer, provided he exercises reasonable care and judgment. Notice to the defaulting buyer, will, however, be material on the question of reasonableness. The purpose adopted in the Uniform Sales Act is to enable the unpaid seller in possession of goods to realize upon them after the buyer's default has lasted an unreasonable time without the necessity of intricate or uncertain formalities. That this is the better rule as a practical matter can hardly be open to question.

(6) *Seller's Right to Recover the Price.* The ordinary rule at common law is that the seller under a contract of sale which is broken by the buyer can recover the price in full only if title has passed to the buyer. If title has not yet passed when the contract is broken, the seller still owns the property and is entitled only to damages for breach of contract.[146] There is, hovewer, a considerable body of law allowing the seller under certain circumstances to treat the goods as the buyers and recover the whole price, and some of the authorities even go so far as to let the buyer recover the whole price as a matter of course regardless of special circumstances and regardless whether title has passed before the contract was broken.[146] It has even been gravely contended that this last-mentioned rule prevails in North Dakota, tho our court in its decision discountenanced any such view.[147]

Under the Uniform Sales Act, section 63 (3), the rule is settled that the seller may recover the full price, even tho title has not passed at the time of the breach, only in the cases where the goods cannot be readily resold at a reasonable price. This takes care of the only cases where the ordinary common-law rule imposes considerable hardship upon the seller and yet prevents the title from being foisted upon the buyer without his consent in ordinary cases. It is roughly analogous to the generally prevailing rule in equity permitting specific performance of a contract for sale of a unique chattel on the ground that damages for the breach are inadequate.

This section of the Uniform Sales Act would, to the extent stated, modify section 7156 which limits the seller's recovery of the full price to cases where the title has passed. It would, however, prevent any such rule as was recently contended for, that the seller should be allowed to recover the full price in all cases, from becoming established in our law, and would definitely put the question at rest in this state if it has not been settled already.[148]

146. See above, pages 63-64.
147. See 153 N. W. 137 (N. D.).
148. As our court makes much of the fact that there had been an anticipatory breach, in 153 N. W. 137, it is not possible to say with

(7) *Sale by One Having a Voidable Title.* Under our Code, section 4340, a minor may sell and transfer title to property of which he is the owner, but he may, within certain limitations, avoid such sale and get the property back. The minor may thus get the property back, even tho his transferee has sold it to a purchaser for value without notice, such purchaser getting only the same defeasible title that his seller had. A similar situation exists in regard to idiots, under section 4344 of our Code. By section 24 of the Uniform Sales Act this rule is changed to protect the purchaser for value without notice if he acquired the title from the minor's transferee before the minor, etc., had avoided the sale. This change in the law is justified by Professor Williston in these words: "It is desirable that at some time the title to goods bought from an infant or lunatic should be perfected, and the advantage to trade and the stability of titles justifies the diminution in the privilege of infants and lunatics.[149]

(8) *Sale at a Valuation.* This subject is not provided for directly in our Code, but would fall under section 5880 providing that if a contract provides an exclusive method by which its consideration is to be ascertained which appears possible on its face but in fact is or becomes impossible, then such provision only is void. The result then is that a sale on terms to be fixt by a third person may become a sale for a price to be determined on principles of quantum meruit as what the goods were reasonably worth, which is very different from what the parties themselves agreed. The Uniform Sales Act, section 10, provides that in such cases the sale shall be avoided except as to the goods which have already been delivered to and appropriated by the buyer, for which he must pay a reasonable price. The position taken in the Uniform Sales Act is probably more nearly in accord with common-law principles.[150]

c. *The Changes hardly Touch Our Present Case Law.* (1) *Where the Uniform Sales Act Provides for Cases not directly Covered in our Code.* As the Uniform Sales Act is an up-to-date and careful codification of the prevailing common law, and as our cases are worked out on common-law principles, based on common-law authorities, if there is no code section applicable to the case in hand

entire assurance that the broader question is also decided, whether title can be passed to the buyer without his consent where he gives no previous notice of repudiation but merely refuses to receive the goods when tendered.

149. Williston on Sales, sec. 348.

150. For extended discussion of the merits involved in this proposition, see Pothier, Sale, ,No. 24; Story on Sales, sec. 220; 1 Parsons, Contracts, 5th ed., p. 525; 4 Kents' Commentaries, p. 468, p. 477; 1 Mechem on Sales, sec. 213; Williston on Sales, secs. 174-177.

it may be expected that the cases thus worked out in our courts should in the main agree with the provisions of the Uniform Sales Act which are additions and not changes in our Code. This conclusion is amply confirmed by examination of the reports of our decided cases. Some of the cases have been referred to above, in connection with various provisions of the Act, which add to or make more specific the law contained in our Code. No cases directly opposed to any of these provisions have been found, tho it would probably be rash to say there may not be even isolated dicta running in other directions.

(2) *Where the Uniform Sales Act makes Affirmative Changes in our Code.* (1) *Warranty.* Under our Code, section 5994, permitting rescission for breach of warranty only if the sale was not executed, unless the warranty was intended to operate as a condition, there are several cases trying to define what that proviso means.[151] As this section would be changed by the Uniform Sales Act which allows rescission for breach of warranty whether title had passed or not, these cases would be likewise superseded, so far as the question of rescission for breach of warranty is concerned. Similarly, one case[152] cites section 5984, which is repealed by the Uniform Sales Act. As the substance of this section, however, is contained in section 6950 of our Code in reference to negotiable instruments which would not be repealed and as the case mentioned is a case of a negotiable instrument, the repeal of section 5984 does not materially affect the case law situation.

No cases involving any question depending on sections 5982-5983 having been decided in our court, repeal of those sections does not affect the case law situation.

Repeal of section 5977 equally leaves the case law situation untouched there having been but one case in which the section is dealt with and that only to show that the case in question was not within it.[153]

(11) *Enforcement of Seller's Lien.* One case,[154] decided under 5960, which says the seller may foreclose his lien as on pledged property, is no longer applicable under the Uniform Sales Act, section 60, which permits informal resale if done with reasonable care and judgment.

(111) *Seller's Right to Recover the Price.* The particular

151. 14 N. D. 417, 104 N. W. 513; 21 N. D. 575, 132 N. W. 137; —— N. D. ——, 159 N. W. 2.
152. See 24 N. D. 645, 140 N. W. 725.
153. See 19 N. D. 317, 124 N. W. 64.
154. See, 16 N. D. 398, 114 N. W. 313.

distinction introduced by section 63 (3) has not previously been found in our local cases. Since our cases on the question, however, have been rather inconclusive, and have not even yet reached any entirely definite rule,[155] the effect of the Uniform Sales Act upon these cases is more conspicuously to render them certain than to change any rule they already express.

d. *Some Possibly Doubtful Cases.* (1) *Potential Possession.* As has been seen above[155] our cases have never decided whether future goods may be presently sold so as to pass title now. The doctrine of potential possession has been cited in briefs to our court, but has never been either accepted or rejected. If the conclusion under the cropper's contract cases is that there is no lease at all, the question of potential possession does not even arise. That the legal conclusion is that there is no technical lease is probably no longer open to much question.[156] It is therefore submitted that the Uniform Sales Act, section 5 (3), does not change any local case law in North Dakota by providing that where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

(2) *Resale by Seller in Possession.* Section 25 of the Uniform Sales Act provides that a sale by a seller in possession of goods already sold, if delivery is given, will protect the second purchaser who receives the goods paying value in good faith without notice. This definitely settles, rather than changes, our local law. Our Code says retention of possession by the seller is presumptively fraudulent,[157] but we have neither code nor local cases on the question whether delivery, apart from the question of fraud, is necessary to convey title good against subsequent purchasers from the original seller. The rule in the Uniform Sales Act is based upon the common law on the subject generally prevailing in this country.[158]

(3) *Definition of Value.* The definition of value in section 76 of the Uniform Sales Act makes an antecedent claim "value" for a transfer of goods or documents of title either in satisfaction thereof or as security therefor. This definition, tho not in accord with the weight of American authority apart from the Uniform Sales Act,[159] is more nearly correct on principle[160] and accords with the construc-

155. See note 43, p. 64.
156. See footnote 155.
157. See, sec. 7221.
158. See 85 Minn. 264. Also Williston on Sales, sec. 350. As the cases are usually also concerned with the question of fraudulent retention of possession, there are not so many clear-cut cases on this proposition alone.
159. See above, notes 48 and 49.
160. The effect will generally be, under this definition of value,

tion of value adopted in the Law of Negotiable Instruments. Whether or not it changes sections 5873 and 7303 of our Code on what is valuable consideration can be decided only after it is determined what those sections together mean, a task which neither our lawyers nor our courts have as yet been able to perform.

(4) *Waiver of Cause of Action.* Sections 5991-93 and section 6002 of our present Code provide in substance that waivers of causes of action for breach of warranty, express or implied, cannot be made in advance, and that agreements waiving such in advance, or imposing unreasonable terms as to notice which practically works a waiver, shall be void. These sections are new legislation enacted in 1913 overruling some of our cases which had sustained such waivers in favor of threshing machine companies.[161] The Uniform Sales Act has no necessary effect upon these provisions. While it provides that implied obligations may be varied by agreement,[162] which is well established common law, resting upon the fundamental liberty of contract, it does not purport to deal with the question of waivers of causes of action, but expressly provides[163] that the rules of law of the particular jurisdiction as to fraud, mistake, etc., or other invalidating cause shall continue to apply to contracts to sell and to sales of goods. If agreements of waiver are void, therefore, under these sections of our Code, such invalidity is recognized in the Uniform Sales Act.

G. SUMMARY OF CONCLUSIONS

The case for enacting the Uniform Sales Act in North Dakota may be shortly recapitulated. Our law is suffering from lack of uniformity with other states and, especially, our law is on many points very uncertain. This lack of uniformity and lack of certainty may be in large mesure remedied by the adoption of the Uniform Sales Act. The list of particular benefits from such a step is long, the list of changes in existing law is short, and the changes themselves are often of a minor nature. At the price of making a few minor changes in our law we may get the benefit of more satisfactory dealing with those in other states resulting from uniformity, and especially we may get the benefit of definite rules of law for the trial of our local cases, where as yet we have them not, by which con-

that there is the legal detriment which constitutes valuable consideration under ordinary principles of contract, except in the single instance where there is a transfer of the goods as security for a pre-existing debt where there was no obligation to give security.

161. See, for example, 3 N. D. 81, 54 N. W. 311; 3 N. D. 220, 55 N. W. 580; 6 N. D. 48; 10 N. D. 120, 86 N. W. 226 (gloves).

162. Uniform Sales Act, Sec. 70.

163. Uniform Sales Act, Sec. 73.

troversies can be settled when they arise, or even be prevented from arising. By profiting from the lesson of the experience of others in litigation, which is codified in the Uniform Sales Act, we can attain at a stroke thru legislation what it has cost others years of expensive litigation to reach. By legislation we may get these rules at once. By litigation we can get them only gradually, in a long course of years. By legislation we can get them complete. By litigation we can get only isolated fragments at a time. Litigation will always be dilatory, fragmentary, and expensive. Legislation can produce the result at a stroke, promptly, completely, and practically without expense. We should therefore adopt the Uniform Sales Act to give to our law greater uniformity and especially to give to our law a much greater degree of certainty.

Ex. W. J. F.
1-29-17